FOUR-AND-ONE-HALF YEAR REPORT

WILLIAM B. GOULD IV, CHAIRMAN,
NATIONAL LABOR RELATIONS BOARD
1994-1998

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II. Introduction

The decisions we have issued and the policy initiatives we have implemented during the past four plus years have been helpful in advancing constructive, cooperative, harmonious labor-management relations in the U.S. Our decisions have attempted to reflect a balance and consideration for the competing interests of labor, management, and individuals—as well as a commitment to the practice and procedure of collective bargaining and the promotion of voluntarily negotiated procedures by the parties. The genius of the National Labor Relations Act is that it provides a legal framework for industrial relations designed to keep government out of the workplace, leaving most problems to resolution by the parties who are best equipped to solve them using the kinds of creative means preferred by those most directly affected.

The traditional independence of the National Labor Relations Board, a quasi-judicial agency, and its adherence to the rule of law promulgated by the Congress, have been both promoted and preserved during my tenure. New settlement procedures have diminished the potential for wasteful litigation. The Board's case backlog in Washington has been reduced, at least during our first two years in office. The Act's central and principal focus upon both the promotion of collective bargaining and freedom of association for workers contained in the unamended portions of the Preamble of the Act has been stressed. And the Board's credibility as an impartial arbiter of labor disputes, able to obtain enforcement of its orders in the courts, has been restored.

III. Initiatives

A. Advisory Panels

One of our first actions after confirmation was to appoint Advisory Panels composed of distinguished labor lawyers—26 lawyers who represent unions and 26 attorneys who represent employers. These panels serve pro bono and meet twice each year to advise the Board and General Counsel on processing and improving agency service to the public. Seven sets of advisory panel meetings have been held to date, in June and October 1994, March and November 1995, June 1996, January 1997, and March 1998.

My work as a private practitioner representing both management and labor, impartial arbitrator and law professor, has made me sensitive to the importance of providing opinion makers in this field with direct input in devising solutions to the practical problems involved in labor litigation and negotiations. My judgment is that we have been well informed and advised by the individuals on our Advisory Panels who confront day-to-day real life problems in the field. By the same token, these distinguished practitioners have gained insights into the problems that we face as an independent quasi-judicial agency.

We have discussed a wide range of topics, including proposals put forward in the House of Representatives for indexing the NLRB's jurisdictional standards for inflation and the agency's efforts to reinvent and streamline its operations. With almost complete unanimity, the panels—both union and management lawyers—stated their skepticism about the value of indexing the agency's jurisdictional standards to the Consumer Price Index (CPI) without the benefit of Congressional hearings and research on the impact of this proposal. Moreover, both labor and management lawyers expressed considerable concern about the inability of either side to have any rights or remedies if adopting an indexing formula were to deprive the NLRB of jurisdiction over a substantial number of employers and their employees. Such a consensus on both sides of the bargaining table about policy issues is unusual, indeed.

Another topic discussed was the proposal in the Congress to merge NLRB Administrative Law Judges into a government-wide ALJ corps along with Social Security judges and those of other agencies. The management and union advisory panels both agreed that this would be a mistake because the expertise of NLRB judges in labor law would be diluted and eventually lost. The ALJ corps legislation died in the waning days of the 104th Congress.

The Advisory Panels have provided a valuable sounding board on various policy issues and a link to the labor law bar and our constituents in labor and industry. Other early Board proposals discussed with the panels included proposed Administrative Law Judge reforms which met with initial skepticism from both the union and management panels in 1995 but had gained wide support by the completion of a trial period in 1996. The most recent Board proposals included issues involving translations and the use of interpreters in foreign language elections and in unfair labor practice proceedings. The agency benefited from the full discussion and description of experiences from the panel members. Another issue was whether the Board should commence

[1] The views herein are those of the Chairman. They do not necessarily reflect those of the entire Board.

providing absentee ballots in elections, with both panels once again reaching agreement and urging no change, at least at this time, in the Board's practice of denying such ballots.

B. "Super Panel" System

In November l996 the Board implemented an experimental "Super Panel" system for processing certain cases carefully pre-selected by the Executive Secretary. The procedure was recommended by the agency's Joint Labor-Management Partnership.

Under the procedure, a panel of three Board Members meets each week to hear cases which involve issues which lend themselves to quick resolution without written analyses by each Board Member's staff. Most of the cases are resolved unanimously based on straightforward application of settled Board precedent. The occasional case submitted to the Super Panel that presents issues that are not susceptible to resolution by the Super Panel is referred to the regular case procedure for further analysis and briefing by Board or Office of Representation Appeals staffs.

Since the procedure was implemented on November 5, l996, of the 173 cases referred to the Super Panel 140 were resolved unanimously, 18 with a dissent, and 15 were not resolved. This innovative procedure was used to quickly resolve more than one-third of the representation cases, including requests for review, received in fiscal year 1997.

The primary advantage of the Super Panel procedure is the speed with which the issues are resolved, sometimes only a few days after an appeal is filed. This avoids delays in conducting representation elections. Also, by providing for direct participation by each Board Member on the Super Panel at the outset of each case, staff time for analysis and writing is saved. Only one staff attorney, rather than one for each Board Member reviews each case, researches the issues, and presents his or her analysis and recommendations orally to the Super Panel. Of course, many cases are more complex and do not lend themselves to the expedited procedure. The success of the Super Panel process, thus, depends on the ability of the Office of Representation Appeals and of the Office of the Executive Secretary to quickly identify the cases that are good candidates for disposition by the Super Panel. Analysis of the cases by each Board Member in advance of the Super Panel meetings also is crucial.

Nearly all of the cases decided by the Super Panel to date have been representation cases. However, on March 3, 1997, the Board agreed to use the system for carefully selected unfair labor practice ("C") cases on a trial basis.

C. Speed Teams

In another initiative to expedite the resolution of cases, in December 1994, the Board adopted a "speed team" case handling process which has reduced the amount of staff time devoted to cases where the Board is adopting recommended decisions of Administrative Law Judges.

In a speed team case, the issues are presented orally to a Board Member and, after discussion, a written decision is prepared within a matter of days so that the Board Member can approve the written decision while the case is still fresh in the Board Member's mind. This procedure eliminates the preparation of duplicative and unnecessary documents in cases which are essentially factual where credibility determinations already have been made—either by an Administrative Law Judge in an unfair labor practice hearing, or by a Hearing Officer in a dispute arising out of a representation proceeding. The key to the effectiveness of the speed team procedure is direct and active involvement of the participating Board Member.

We have used the speed team case handling method in more than 723 cases (about 30 percent of total cases) with great success in speeding up our decisional process. During FY 1997, 23.9 percent of all C cases and 37.0 percent of all R cases were handled through the speed team process. The result has been reflected in our ability to decrease, by over 25 percent, the processing time for cases coming to the Board for decision. For fiscal year 1993, for instance, the median time for processing of unfair labor practice (C) cases from assignment to issuance was 104 days, and the corresponding median for representation (R) cases was 106 days. For fiscal year 1997 the comparable medians dropped to 79 days for C cases, and 68 days for R cases.

The speed team procedure, and an active meeting schedule, have allowed the Board to move with unprecedented dispatch. From March 1994 through this date we held over 100 full Board meetings—in contrast to 42 meetings held by our predecessors during the same period of time immediately prior to my arrival in Washington, D.C. (This is in addition to nine oral arguments and the 14 Advisory Panel meetings. This activity of the Board is unprecedented in scope and frequency.)

D. Case Inventory

These initiatives have enabled the Board to reduce its backlog to 330 in November 1995, to 397 cases as of the end of FY 1996—one of the lowest levels in over two decades. Regretfully, since then, with our turnover of Board Members and with our shortage of staff and other considerations the backlog has gone up. A range of 400 to 600 cases historically has been considered a normal case inventory. As of August 1998, our backlog had

climbed to 701. My sense is that we would have an even better record which could rival the records of earlier Boards before 1974, if the Federal government shutdowns, the disruptions, and the turnover that ensued in their wake had not slowed the processing of cases. In any event, the present and historically low backlog stands in sharp contrast to the high-water mark of 1,647 cases in February 1984.

E. New Administrative Law Judge Procedures

When I took office in March 1994, I pledged that I would give NLRB Administrative Law Judges additional tools to make them more effective and efficient. To that end, on February 1, 1995, the Board announced a 1-year trial period to experiment with procedures designed to resolve disputes quickly, informally and early in the administrative process and to avoid long and costly litigation, hearings and appeals. Favorable results from the new procedures led the Board to make them permanent, effective March 1, 1996.

1. Settlement Judges

The settlement judge rule gave NLRB judges authority to act as settlement judges. Under this rule, a judge "other than the trial judge" may be assigned to a case "to conduct settlement negotiations," provided all parties agree to participate. Where "feasible," settlement conferences are held in person, and settlement judges may delve more deeply into all aspects of a case than the judge who ultimately will hear and decide it absent settlement.

Before the rule change, many judges were reluctant to inject themselves in settlement discussions because of fear they would compromise their ability to decide cases fairly should settlement discussions prove unsuccessful. Litigants, including some Regional Directors, were also wary of ceding a greater role to judges in the settlement process. As a result of lost settlement opportunities, too many cases were going to trial that should have settled, thereby significantly increasing expenditures in time and money for the agency and private litigants.

Since the settlement judge rule went into effect, we have secured settlements in about 60 percent of our settlement judge efforts. Through July 1998, we assigned settlement judges in 319 cases; settlements were achieved in 195 of those cases.

The settlement judge rule and the increased emphasis the Board has placed generally on settling cases has resulted in a significant increase in overall settlements by Administrative Law Judges. In the two full years following implementation of the rule, judges increased their settlements by about 15 percent over those in the two years prior to the rule—from an average of 572 settlements annually to an average of 718.

2. Bench Decisions

Administrative law judges were also given the authority to issue bench decisions. Under the bench decision rule, judges have discretion to decide that, upon conclusion of a trial, they will "hear oral argument in lieu of briefs," and read their decisions into the record. Before implementation of the bench decision rule, all Administrative Law Judge decisions were required to be issued in writing after full briefing by the parties, including in relatively simple factual cases.

From February 1995 through July 1998, NLRB judges issued 102 bench decisions (See Attachment B for a breakdown on bench decisions by type of violation). In the first 6 months of fiscal 1998, bench decisions accounted for about seven percent of the total decisions issued by judges in that period. As of August 1, 1998, 21 of those bench decisions were pending before the Board. But, of the 85 in which the time period for filing exceptions has elapsed only 48 (or 57 percent) were appealed; the rest were adopted by the Board in the absence of exceptions. This is lower than the roughly 70 percent rate at which written judges' decisions are appealed. Of the 24 cases that were appealed to the Board and have been decided by the Board, only two involved reversals or partial remands. Moreover, out of the 63 bench decisions which have been decided by the Board or which have been adopted pro forma by the Board, only seven or 11.1 percent have gone for decision to the courts of appeals. Two are pending, two have been affirmed and one was remanded in full. Thus, it is clear that the judges have chosen wisely those cases that warranted bench decisions. And, contrary to the views of critics of the new rule before it was implemented, the bench decision rule has resulted in less, not more litigation. The rule has not only saved time on Board review, but the bench decisions themselves are issued, on average, some three or four months earlier than they would otherwise have issued.

3. Time Targets

In a separate action, in September 1994, the Board began phasing in time targets for Administrative Law Judge decisions. The results have been dramatic. The median number of days from close of hearing to issuance of a judge's decision has dropped from 138 in fiscal 1993 to 112 in fiscal 1997. In the same period, the median from receipt of briefs or submissions to judge's decision has dropped from 83 days to 60 days. This accomplishment is all the more remarkable because we are finding that the cases that do go to trial and require judges' decisions are longer and more complex than in the past. For example, the average transcript length in cases in which judges' decisions issued in the first 6

months of fiscal 1998 was 684 pages, an all-time high. As recently as fiscal 1992, that figure was 449 pages.

4. Increase in Productivity by a Diminishing Number of Judges

All of the above has been accomplished with a diminishing number of Administrative Law Judges, which has been reduced to a historic low by retirements and other attrition. In November 1993, the agency employed 78 judges as compared to 58 as of May 22, 1998. That is half the number (117) employed in 1981.

Of necessity, the diminishing number of judges has required the existing corps of judges to become more productive. The overall productivity of NLRB judges has in fact increased dramatically. In the past 4 years, judges have increased their average disposition of cases (that is, the total of decisions and settlements per judge) by 38.6 percent. In fiscal 1993, the average dispositions per judge were 15.20; in fiscal 1997, that figure was 21.07.

NLRB judges are truly the unsung heroes of this agency. They represent the Board in the trenches, giving life in every part of our country to a statute of national scope and importance. I am proud to have played a part in giving them the additional tools that they needed to dispense industrial justice in a more effective and efficient manner.

F. Usage of 10(j) Injunctions Increased

During my tenure, the Board's use of l0(j) injunctions has increased as a means of quickly putting a stop to certain violations of the Act by employers or unions and to provide an incentive to voluntary compliance.

In the first full year of the new Board's term, March 1994 to March 1995, 126 injunctions were authorized. This represented a substantial increase over the number of injunctions authorized by our predecessors. For example, in fiscal year 1993, the prior Board authorized 41 injunctions and in fiscal year 1992, only 26 injunctions. Since March 1994, the Board has authorized 318 10(j) injunctions and denied authorization in 17 cases or 5.1 percent of all cases. I voted against 10(j) authorization in those 17 cases and two other cases in which I dissented while the Board granted authorization. (See Attachment C for a breakdown of injunction activity since March 1994.) This increase in the use of injunctions has sent a message both to employers and unions that the Board is prepared to take prompt and effective action against violations of the Act in which the passage of time would render Board remedies ineffective. For the cases pursued to a conclusion from Fiscal Year 1994 through Fiscal Year 1997, the agency has had a success rate of approximately 86.4 percent, including both wins and settlements.

One of the highlights of my tenure to date was participating in the Board's March 26, 1995 decision to seek injunctive relief against unfair labor practices by Major League Baseball teams. The agency played a decisive role in saving both the 1995 and 1996 seasons and creating an environment in which a comprehensive collective bargaining agreement could be negotiated in November 1996.

Finally, I would note that in connection with one 10(j) case, I was of the opinion that the Board should permit the parties to present oral argument as the employer had proposed. A majority of the Board, however, voted against the motion.

G. Mail Ballot Procedures

One of the early procedural improvements addressed by the Board under my chairmanship was increasing the use of mail ballots in situations where conditions are such that costs would be lower and/or employee participation would be maximized by using postal ballots. The Board has continued to encourage greater use of mail ballots through its decisions, as detailed in the attached Decisional Highlights.

Of course, the overwhelming number of secret ballot elections are held manually in the workplace of the employees, as has been the historic practice. There has been no intent to change this time-honored practice. Rather, it has been our intent to employ mail ballots in situations where workers would not have the opportunity to cast their ballots and thus participate in the electoral process, or where the agency's pressed financial circumstances would be unduly burdened. Thus, representation elections are conducted by mail ballot only when it is cost effective, practical, and consistent with the purpose and policies of the Act.

This policy of using mail ballots to maximize the opportunity of workers to exercise their statutory right to vote in representation elections is reflected in the Board's decision in San Diego Gas and Electric, 325 NLRB No. 218 (July 21, 1998), and Sitka Sound Seafoods, 325 NLRB No. 125 (Apr. 29, 1998).

In San Diego Gas, the majority abandoned the Board's Casehandling Manual "infeasibility" standard, which stated that "the use of mail balloting, at least in situations where any party is not agreeable to the use of mail ballots, should be limited to those circumstances that clearly indicate the infeasibility of a manual election." Noting that the Manual has not been revised since 1989 and does not reflect current Board precedent regarding mail ballots, the majority stated that the direction of a mail ballot election is appropriate: (1) where eligible voters are "scattered" because of their job duties over a wide geographic area; (2) where eligible voters are "scattered" because of their work schedules; and (3)

where there is a strike, a lockout, or picketing in progress. I concurred in a separate opinion, stating that I would find the use of mail ballots appropriate in all situations where the prevailing conditions are such that they are necessary to conserve Agency resources and/or enfranchise employees and joined in the decision to abandon the "infeasibility" standard. I also stated that I would find that budgetary concerns standing alone could justify the direction of a mail ballot election.

In Sitka Sound, the Regional Director directed a mixed mail-manual election. Among the employees the Regional Director permitted to vote by mail were certain seasonal employees who were not then actively working for the employer. Terming those employees "laid-off," the employer asserted that the Regional Director failed to comply with Section 11336.1 of the Casehandling Manual. The Board panel unanimously rejected the employer's contention, finding that the Regional Director did not abuse his discretion in light of the fact that many of the employees in question were widely scattered at the time of the election and otherwise would have been unable to vote.

H. Single Unit Rule

On June 2, 1994, the Board issued an Advance Notice of Proposed Rulemaking (ANPR) on the issue of the appropriateness of requested single location bargaining units in representation cases arising in various industries. See 59 Fed. Reg. 28501. The ANPR invited interested parties to comment on the wisdom of promulgating a rule or rules on this issue, and the appropriate content of such a rule or rules. In response, 41 written comments were received from employers, trade associations, labor organizations, policy organizations, and individuals. Thereafter, on September 28, 1995, the Board issued a Notice of Proposed Rulemaking setting forth a proposed rule applicable to almost all Board cases in which a unit of unrepresented employees at a single location was sought. The proposed rule set forth the factors the Board proposed to use in determining the appropriateness of such units. Again, the Board solicited comments from all interested persons.

The goal of the single unit rule was to eliminate the unnecessary delays and litigation in traditional case-by-case adjudication of petitioned-for single location units. Under traditional adjudication, each election petition seeking a single location unit may be litigated—often, at great length—by the parties, with resultant delay and needless cost to all, including the taxpayer, even though the circumstances of the case are substantially identical to ones ruled on by the Board countless times over the years in previous cases. In contrast, the proposed rule would have set forth, clearly and simply for the public and labor bar, the factors the Board would find, and has in the past found, critical in most single location cases.

The Board received 215 comments in response to the Notice of Proposed Rulemaking. Because of the propagation of misinformation about it, the proposed single location rule was met with opposition from employer groups and some members of Congress. The proposed rule—which was designed not to change the law nor advantage either unions or employers, but to save time and money for the agency and for the parties—became a hostage in the deliberations over the agency's appropriations. Before those comments could be reviewed or further action could be taken on the proposed rule, Congress attached a rider to the agency's FY 1996 appropriations bill, prohibiting the expenditure of funds used "in any way" to promulgate a final rule. That rider also was attached to the agency's final appropriations bills for FY 1997 and FY 1998.

On February 23, 1998, the Board (over my dissent) withdrew the proposed rule. See 63 Fed. Reg. 8890–8891. Regrettably and predictably, this vote led directly to attempts by some Members of the House Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies to interfere in case adjudication. This attempt was resisted in my letter of March 19, 1998 to the Subcommittee in response. (See Attachment D.)

IV. ENFORCEMENT

A. Court of Appeals Enforcement Rate

A reliable baseline indicator of the impartiality of Board decisions is how well they fare upon appeal to the U.S. Courts of Appeals. I am particularly proud that the Board's decisions during my tenure have been enforced by the courts in whole or part about 80 percent of the time, and in the past half of Fiscal Year 1998 the enforcement rate was 88.6 percent.

Of the 79 court decisions handed down during the period October-March 1998, the Board prevailed in 93 percent of contested cases involving review or enforcement of its orders (70.9 percent were complete wins, while 17.7 percent involved either modification of the Board's order or partial remand). In comparison, the Board's enforcement rate since FY 1990 has averaged 83.4 percent. (See Attachment E for a year-by-year breakdown since fiscal year 1990).

B. Supreme Court Review

Similarly, the Supreme Court has accorded deference to NLRB decisions during my tenure.

The agency argued four cases before the Court during my chairmanship. In three of the cases the agency's position was fully upheld by the Court and in the fourth case the Supreme Court upheld the Board's standard,

but disagreed with the Board's application of the standard to the facts of that case.

In NLRB v. Town & Country, 116 S. Ct. 450 (1995), the Court unanimously held that paid union organizers are "employees" within the meaning of the Act and are, therefore, protected against employer retaliation in the form of discharge or discipline for protected activity. The Court recognized that "the Board often possesses a degree of legal leeway when it interprets its governing statute," but added that "the Board needs very little legal leeway here to convince us of the correctness of its decision." 116 S. Ct. at 453.

In Auciello Iron Works Inc. v. NLRB, 116 S. Ct. 1754 (1996), the Court again unanimously upheld the Board's position and held that an employer may not refuse to bargain with an incumbent union on the ground that it has lost majority status where it has previously entered into a contract with such a union. The Court stated that "the Board's judgment is entitled to prevail. To affirm its rule of decision in this case, indeed, there is no need to invoke the full measure of the 'considerable deference' that the Board is due . . . ." 116 S. Ct. at 1759.

And, third, the Court in Holly Farms Corp. v. NLRB, 116 S. Ct. 1396 (1996), held that some workers involved in chicken processing were "employees" within the meaning of the Act and not excluded by virtue of the agricultural employee exemption contained in the Act. Although Holly Farms was a 5–4 decision—in contrast to the unanimous holdings of the Court in both Town & Country and Auciello—the major theme involved in each of these cases is the same. The Court, time and time again, noted the Board's expertise and its policy of granting deference to the expert agency's interpretation of its own statute. See 116 S. Ct. at 1401 and 1406.

Finally, in Allentown Mack Sales and Service, Inc. v. NLRB,[2] the Court held, by a 5–4 vote, that the Board's "good-faith reasonable doubt" standard for determining whether an employer lawfully may poll its employees to determine if the union retains majority support was "facially rational and consistent with the Act." However, the Court concluded, again by a 5–4 vote, that the Board erred in its factual finding that Allentown lacked a good-faith reasonable doubt. The Court held that certain employee statements, such as expressions of dissatisfaction with the quality of union representation by employees who hope to be hired by a successor employer interviewing them for employment discounted by the Board, could "unquestionably be probative to some degree of the employer's good-faith reasonable doubt." However as Justice Breyer said in dissent:

> The Board in effect has said that an employee statement made during a job interview with an employer who has expressed an interest in a nonunionized work force will often tell us precisely nothing about that employee's true feelings. That Board conclusion represents an exercise of the kind of discretionary authority that Congress placed squarely within the Board's administrative and fact-finding powers and responsibilities.[3]

The language employed by the Court in these decisions, coupled with its holdings, indicate that the Board's credibility with the Court has never been better. And the same is true throughout the entire federal judiciary.

Although there is no Board case currently pending before the Court, there is one case which implicates the Board's jurisdiction and rulings, Marquez v. Screen Actors Guild, Inc.,[4] reviewing a Ninth Circuit ruling on which the Court granted certiorari a couple of months ago. This case represents another instance during my tenure in which a matter involving the Act, but not arising out of Board proceedings, will be before the Court.

The Court ruled in another case, Brown, et al. v. Pro Football Inc., 116 S. Ct. 2116 (1996), involving the relationship between antitrust and labor law. Here, while concluding that the federal labor law shields football from antitrust liability when the owners act unilaterally subsequent to bargaining to impasse, the Court noted that it could not resolve the ultimate issue of accommodation between the competing statutes until it hears "the detailed views of the Board, to whose 'specialized judgment' Congress 'intended to leave' many of the 'inevitable questions' concerning multi-employer bargaining bound to arise in the future . . . ." 116 S. Ct. at 2127. Again, the Court stressed the central role of the Board and the Court's policy of deference to this agency.

In Marquez, it is likely that the Court will show an interest in the Board's view —and my hope is that the Board's view is expressed to the Court. The issue presented to the Court in Marquez is whether a collective bargaining agreement which requires employees to be "members" of the union or "member of the union in good standing" as a condition of employment is facially violative of Section 8(a)(3) of the Act, absent a concurrent explanation in the agreement of the limited obligations involved, i.e., the payment of periodic dues and initiation fees which constitutes the outer limits of that which can be imposed upon employees under union contractual provisions, and whether a union violates its

[2] 118 S. Ct. 818, 829 (1998).

[3] Id. at 835–836.

[4] 124 F.3d 1034 (9th Cir. 1997).

duty of fair representation when it negotiates a union security clause which does not set forth the appropriate limitation on dues and initiation fees.

The dispute in this case was about a calculation of union dues which are required to be paid under a union security clause in a collective bargaining agreement. The plaintiff sued the union and company, alleging that the union had breached its duty of fair representation by negotiating and enforcing the agreement requiring employees to become members in the union and demanding payment of full dues rather than advising the plaintiff of her right to pay only a percent of dues used for representational purposes as is required by Communications Workers v. Beck.[5]

The other issue in Marquez is how one defines the 30-day grace period established in the Taft-Hartley amendments to Section 8(a)(3) which determine when a dues obligation may be imposed upon an employee under a valid union security provision in a collective bargaining agreement. In essence, the issue here is what constitutes the appropriate unit for the purpose of computing the 30-day grace period. Unit determinations have been made traditionally by the Board under Section 9(a).

I am of the view that the statutory claims relating to grace periods under Section 8(a)(3), particularly where they inevitably focus upon the question of how one defines the employer or the unit, are grist for the Board's mill and properly within its primary jurisdiction. While the Court in Beck said that courts may resolve unfair labor practice questions that emerge as collateral issues, the grace period issue hardly seems to be collateral in Marquez. It seems to be at the heart of the dispute. Thus, I am of the view that the Court should conclude that membership must be defined consistent with General Motors and Beck and that a definition of membership in the collective bargaining agreement is a requirement, and that the Board has primary jurisdiction where issues like the statutory grace period and resolution of unit matters are at the heart of the dispute as they are in Marquez.

C. Contempt Actions

The Board has not hesitated to authorize contempt actions against recalcitrant employers and unions absent meaningful settlement discussions. Since March 1994, the Board has authorized the General Counsel to institute contempt proceedings in 52 cases against employers and in three cases against unions.

With respect to the union cases, two of the three cases were settled pursuant to consent orders. I voted to authorize contempt in all three cases (and to disapprove one of the resulting settlements), as I did in all the employer cases.

Several of the cases against employers had especially good outcomes in that, after the cases were settled, the union and employers reached agreement on collective bargaining contracts and no further difficulties under the Act subsequently have come to the Board's attention.

V. DECISIONAL HIGHLIGHTS

Throughout my term, I have adhered to a presumption in favor of *stare decisis*. While disagreeing with some Board precedent, my primary focus has been to effectively implement existing law.

The common thread through many of our decisions, particularly my own dissenting and concurring opinions, is one of balance and consideration for the competing interests of labor, management, and individuals, as well as a commitment to the practice and procedure of collective bargaining and the promotion of voluntary negotiated procedures by the parties. This is the fundamental thesis underlying our decisions as well as our use of Section 10(j) injunctions, and the rulemaking process.

(See Attachment F for a discussion of selected decisions rendered since March of 1994.)

VI. CONCLUSION

Based upon the above indicia, my policy initiatives and substantial law decisions have focused upon expediting our administrative procedures, substituting settlements for litigation, and emphasizing law enforcement *and* expanding our arbiter mission. In sum, the state of the NLRB in 1998 has improved considerably during my tenure.

VII. RESIGNATION LETTER OF JULY 7, 1998 TO PRESIDENT CLINTON AND PRESIDENT'S JULY 29, 1998 RESPONSE

(See Attachment G.)

VIII. BIOGRAPHY OF WILLIAM B. GOULD IV

(See Attachment H.)

ATTACHMENT A

SUMMARY OF ACCOMPLISHMENTS AND INITIATIVES

Restorating of the NLRB's Credibility: The decisions we have issued and the initiatives we have implemented since March 1994 have restored the credibility of the National Labor Relations Board. This is because my approach during these past 4 plus years has been similar to that which I employed as an impartial arbiter, i.e., an attempt to seek the middle ground—that "vital center," as President Clinton has described it—to restore the

[5] 487 U.S. 735 (1988).

public's confidence in the NLRB's mission of impartiality and neutrality. Notwithstanding the growing polarization between labor and management attributable, in substantial part, to the decline of collective bargaining, our efforts have advanced more constructive, cooperative, harmonious labor-management relations in litigation arising under the National Labor Relations Act in the United States.

Promoting Balance and Impartiality in Labor-Management Relations: The common thread running through many of our decisions, particularly my own dissenting and concurring opinions, is one of balance and consideration for the competing interests of labor, management, and individuals, as well as commitment to the practice and procedure of collective bargaining and the promotion of voluntary negotiated procedures by the parties. This is the fundamental thesis underlying our decisions as well as our use of Section 10(j) injunctions and the rulemaking process.

Promoting Settlements and Reducing the Need for Wasteful Litigation: I have striven to make one of the hallmarks of my chairmanship the promotion of settlements and collective bargaining in our adjudicatory process. Through the bully pulpit of this position, through my decisions and writings, I have urged the Board to heighten its emphasis on settling cases wherever possible in lieu of protracted and frequently wasteful litigation. We have promoted the parties' own procedures so that they can resolve their differences themselves through their voluntary mechanisms. Under my watch, the agency has had a truly outstanding settlement rate. Our field offices have disposed of more than 95 percent of the agency's caseload without the necessity of formal litigation, and about 96 percent of the merit cases are settled.

Streamlining and Expediting the Administrative Process: As part of the Administration's reinventing government program, I have initiated a number of administrative reforms intended to make the agency operate more efficiently, lower costs, reduce the need for expensive, lengthy litigation, and simplify and expedite NLRB procedures.

Speed Teams: The Board instituted a "speed team" procedure to identify and process cases presenting straightforward issues. Decisions are drafted and circulated promptly without the need for detailed, time-consuming memos. During FY 1997, 24 percent of all unfair labor practice (ULP) cases and 37 percent of all representation (R) cases were speed team cases. As a result, median times from assignment to issuance of Board decision have declined. All ULP cases issued in a median time of 79 days in FY 1997; this compares with a median in FY 1993 of 104 days.

Super Panels: The Board also implemented a "super panel" system for processing representation appeals cases. Board Members meet to hear cases that involve issues that lend themselves to quick resolution without written analysis by each Board Member's staff. Most of the cases are resolved unanimously based on straightforward application of settled Board precedent. Of the 173 super panel cases since November 1996, 140 were resolved unanimously, 18 with a dissent, and 15 were not resolved.

Reducing the Backlog: Our initiatives have enabled the Board to make progress in reducing its vexing case inventory. During FY 1995 we actually got the backlog down to its lowest level since statistics were kept! Unfortunately, since then pending cases have been on the rise (366 in FY 1995, 397 in FY 1996, 567 in FY 1997, and 701 as of August). This troubling trend I attribute, in part, to Board Member turnover and cuts in Board Members' staffs of about 15 percent since I came to office. Notwithstanding the backsliding, the backlog is considerably lower today than the high-water mark of 1,647 cases in February 1984. I also would point out that our enforcement and reform efforts have been hampered by budgetary cuts imposed by Congress in this era of divided government. Since FY 1990, the FTE level has dropped 14 percent (from 2,245 to 1,930). Meanwhile, from FY 1990 to present, the backlog of unfair labor practice cases in the field has increased by 66.4 percent.

Advisory Panels: One of my first initiatives was to appoint advisory panels composed of distinguished union and management labor lawyers, 26 of each. These panels meet twice yearly to advise the Board and General Counsel on possible changes in NLRB procedures that will expedite service to the public. Among the topics the panels have discussed are ALJ procedures; blocking charges in representation elections; time targets for expediting judges' decisions and representation (R) cases; adjusting the NLRB's jurisdictional standards; foreign language elections; mail ballot elections and absentee ballots; and 10(j) injunctive relief.

Instituting Administrative Law Judge Reforms: In February 1995, the Board announced a 1-year experiment of procedures designed to resolve disputes quickly, informally, and early in the administrative process to avoid long and costly litigation, hearings, and appeals. Favorable results from the new procedures led the Board to make them permanent effective March 1, 1996.

Settlement Judges: Where feasible, a judge other than the trial judge may be assigned to a case to conduct settlement negotiations, as long as all parties agree to participate. Through July 1998, settlement judges were assigned in 319 cases; settlements were achieved in 197 or just about 62 percent of those cases. In the two full

years following implementation of the rule, judges increased their settlements by about 15 percent over those in the two years prior to the rule—from an average of 572 settlements annually to an average of 718.

Bench Decisions: Under the new bench decision rule, Administrative Law Judges have discretion to "hear oral argument in lieu of briefs," and read their decisions into the record. From February 1995 through July 1998, NLRB judges issued 102 bench decisions. In the first six months of fiscal 1998, about seven percent of the total decisions issued by judges were bench decisions. Overall, only 49 percent of bench decisions were appealed—a figure much lower than the roughly 70 percent rate at which written judges' decisions are appealed. Moreover, out of the 65 bench decisions which have been decided by the Board or which have been adopted pro forma by the Board, only seven or 10.8 percent have gone for decision to the court of appeals.

Time Targets: Judges were given time targets for issuing decisions in September 1994. Since then, the median number of days from close of hearing to issuance of a judge's decision has dropped from 138 in fiscal 1993 to 112 in fiscal 1997. In the same period, the median time from receipt of briefs or submissions to judge's decision has dropped from 83 days to 60 days.

Increase in ALJ Productivity: The ALJ initiatives have been accomplished with a diminishing corps of judges, which has been reduced to a historic low from 78 judges in November 1993 to 58 as of May 1998—half the number (117) employed in 1981. Despite the reduction, the overall productivity of judges has increased with the average disposition of cases (decisions plus settlements) increasing by 39 percent!

Increasing Use of 10(j) Injunctions: To promote collective bargaining and to address the problem of delay under our statutory scheme, we increased the use of 10(j) injunctions. This section of the Act allows the Board to petition a federal district court for an injunction to temporarily prevent any unfair labor practice after a complaint has issued and to fashion a remedy pending full review of the case by the Board. The most well known example of the Board's use of this procedure during my term was in the 1994–1995 Major League Baseball dispute. I am proud that my deciding vote for injunctive relief resulted in industrial peace and a new collective bargaining agreement. From March 1994 through July 1998, the Board has had a success rate of 85.3 percent in the 312 10(j) cases it has authorized, including wins and settlements, on a par with or better than the experience of prior Boards.

Enforcement: The rate of enforcement by the U.S. Courts of Appeals of Board decisions has increased during these past four years. For instance, our decisions were enforced by the courts in whole or in part 78.9 percent in FY 1994; 72.5 percent in FY 1995; 83.9 percent in FY 1996; 83.8 percent in FY 1997; and 88.6 percent for the first seven months of FY 1998. During my term, the Supreme Court rendered three decisions that upheld the Board's position—two of them by 9–0 votes (Town and Country, Auciello Iron Works, and Holly Farms). In a fourth case, Allentown Mack, the Court upheld the Board standard but by a 5–4 vote found that the Board erred in its factual finding that the employer lacked a "good faith reasonable doubt" that the union retained majority support.

ATTACHMENT B

BREAKDOWN OF BENCH DECISIONS

BY TYPE OF VIOLATION

Violation Alleged	Number	Frequency
8(a)(1)	23	22.5%
8(a)(1) and (2)	1	1.0%
8(a)(1) and (3)	31	30.4%
8(a)(1), (3) and (4)	2	2.0%
8(a)(1) and (4)	3	2.9%
8(a)(1) and (5)	23	22.5%
8(a)(1), (3) and (5)	6	5.9%
8(b)(1)(A)	6	5.9%
8(b)(1)(A) and 8(b)(2)	1	1.0%

8(b)(3)	1	1.0%
Backpay/ Compliance	3	3.9%
Other	2	2.0%

ATTACHMENT C

BOARD DISPOSITION OF 10(j) INJUNCTION CASES SINCE MARCH 1994

	Authorized	Completed to Conclusion	Win (full and in part) (Courts)	Loss (Courts)	Settled/ Adj	Success Rate (wins plus settled/adj)	Win Rate (Courts)
FY 94 (3/1/94 - 9/30/94)	**66**	**59**	**22**	**12**	**25**	**79.9%**	**64.7%**
FY 95	**104**	**98**	**37**	**12**	**49**	**87.8%**	**75.5%**
FY 96	**53**	**52**	**20**	**5**	**27**	**90.4%**	**80.0%**
FY 97	**53**	**47**	**15**	**7**	**25**	**85.1%**	**68.2%**
FY 98	**42**	**26**	**12**	**1**	**13**	**96.2%**	**92.3%**
Total	**318**	**282**	**106**	**32**	**139**	**86.9%**	**74.1%**

ATTACHMENT D

CONGRESS OF THE UNITED STATES
Washington, DC 20515

February 24, 1998

William Gould IV, Chairman
National Labor Relations Board
1099 14th Street NW
Washington, D.C. 20570

Dear Chairman Gould:

We are writing to ensure that your agency is abiding by the prohibition contained in Title IV of Public Law 105–78, the Fiscal Year 1998 Labor/HHS/Education and Related Agencies Appropriation Act. That prohibition states "none of the funds made available by this Act shall be used in any way to promulgate a final rule regarding single facility bargaining units in representation cases." As you know, this provision has been included in each of the Labor-HHS-Appropriations laws beginning with Fiscal Year 1996 for the purpose of precluding regulations proposed by your agency on September 28, 1995 ("Appropriateness of Requested Single Location Bargaining Units in Representation Cases," 59 Fed. Reg. 50, 146).

While we are aware that the Board has recently withdrawn this proposed rule, it has been brought to the attention of the subcommittee that in two separate cases decided by your Board last August—*D&L Transportation, Inc*. 324 NLRB No. 31 (August 7, 1997) and *Dattco, Inc*., 324 NLRB No. 53 (August 25, 1997)—the Board reversed the Regional Director's decision to approve a multi-facility unit and approved instead a single-facility unit, as requested by the union. We are unaware of any other recent rulings by the Board which have been approved in a multi-facility unit, whether affirming or reversing a Regional Director's decision.

While we recognize that the Board has the authority to reverse Regional Director rulings, it is relatively uncommon for the Board to do so. Moreover, we are unaware of any situations where the Board has approved a multi-facility unit against the wishes of the petitioning union. Thus, we are concerned that the Board is, for all practical purposes, carrying out the policies of the prohibited regulations as if they were actually in effect. Even if the Board is not applying a new, more rigid presumption in favor of single-facility units, we are concerned that the various Regional Directors throughout the country will react to *D&L Transportation* and *Dattco* by approving union requests for single-facility units simply to avoid being reversed by your Board.

To ensure that the prohibition of P.L. 105–78 is being carried out both in letter and spirit, we ask that you pro-

vide assurances that the long-standing policies regarding approval of single-facility units are still in effect, including evidence, if any, of Board approvals of multiple-facility units against the wishes of the petitioning unions. In addition, we request that you communicate in writing to the Regional Directors that their determinations regarding requests for single-facility units are to be handled according to the rules that were in effect on September 28, 1995.

We would appreciate your prompt attention to this request.

Sincerely,

s/s John Edward Porter	s/s C.W. "Bill" Young
s/s Henry Bonilla	s/s Ernest Istook, Jr.
s/s Dan Miller	s/s Jay Dickey
s/s Roger Wicker	s/s Anne M. Northup

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

March 19, 1998

Honorable John Edward Porter
U.S. House of Representatives
2373 Rayburn House Office Building
Washington, DC 20515–1310

Honorable Henry Bonilla
U.S. House of Representatives
1427 Longworth House Offlce Building
Washington, DC 20515–4323

Honorable Dan Miller
U.S. House of Representatives
102 Cannon House Office Building
Washington, DC 20515–0913

Honorable Roger F. Wicker
U.S. House of Representatives
206 Cannon House Office Building
Washington, DC 20515–2401

Honorable C.W. Bill Young
U.S. House of Representatives
2407 Rayburn House Office Building
Washington, DC 20515–0910

Honorable Ernest J. Istook
U.S. House of Representatives
119 Cannon House Office Building
Washington, DC 20515–3605

Honorable Jay Dickey
U.S. House of Representatives
2453 Rayburn House Office Building
Washington, DC 20515–0404

Honorable Anne Meagher Northup
U.S. House of Representatives
1004 Longworth House Office Building
Washington, DC 20515–1703

Dear Representatives Porter, Bonilla, Miller, Wicker, Young, Istook, Dickey and Northup:

I am in receipt of your letter of February 24, 1998, and I must confess that it causes me grave concern. You express the view that the Board and Regional Directors are or may be carrying out policies of which you disapprove and you seek a variety of "assurances" about future Board adjudications. Never before has the Board been instructed or requested to advise Regional Directors how to proceed in a substantive area of Board law. Never before has Congress attempted to intrude on the adjudicatory responsibilities of the Board with respect to classes of pending cases and I fear that the tendency reflected in your letter, if left unchecked, will erode the system of independent adjudication and democracy in the workplace which has been such a valuable and important aspect of national labor policy.

Moreover, this is to advise you that the long-standing policies regarding the appropriateness of requested single-facility units are still in effect at the Board and have been during my entire tenure as Chairman from March 1994 through 1998. As you may recall, I pointed out to you on a number of occasions that the proposed rulemaking, now withdrawn by the Board over my dissenting vote, attempted to codify this law—the one change being that the criteria for employer rebuttal would be made more specific so that wasteful litigation could be eliminated and relief would be provided to both the taxpayer and private parties.

In responding to your letter, I shall address the following areas: (l) the independence of administrative agencies in the area of adjudication; (2) the Board's approval of multi-facility units against wishes of petitioning unions during my term; (3) the specific cases mentioned in you letter, i.e., *D&L Transportation, Inc*., 324 NLRB No. 31 (Aug. 7, 1997), and *Dattco, Inc*., 324 NLRB No. 53 (Aug. 25, 1997) and (4) the issue of Board reversal of Regional Director decisions.

(1) Congress created the National Labor Relations Board as one of the independent administrative agencies with quasi-judicial responsibilities. As such, the Board, in order to be faithful to the rule of law so criticall to a well-functioning democracy, must maintain its inde-

pendence in connection with casehandling matters. **Attempts by Congress to interfere with the Board's resolution of pending cases, or cases that are likely to come before the Agency for resolution, compromise the Board's independence. This independence is a prerequisite for the confidence which the Board must enjoy if the statute is to be interpreted impartially and in a manner compatible with the purposes of the Act by those entrusted with such responsibilities by the President and the Senate.**

Thus, what Chief Justice Rehnquist said of our courts applies well to all agencies with judicial responsibilities:

> [T]here are a very few essentials that are vital to the functioning of the federal court system as we know it. Surely one of these essentials is the independence of the judges who sit on these courts. [Chief Justice William H. Rehnquist, Address at the Washington College of Law Centennial Celebration Plenary Academic Panel: The Future of the Federal Courts, American University, p. 10 (Apr. 9, 1996).]

As Chief Justice Rehnquist said:

> Change is the law of life, and the judiciary will have to change to meet the challenges which will face it in the future. But the independence of the federal judiciary is essential to its proper functioning and must be retained. [Rehnquist address. supra at p. 18.]

Quite obviously, Congress can always amend or repeal the National Labor Relations Act and the Senate, through its advice and consent as it relates to Presidential appointments of Board Members and the General Counsel, plays a continuous role in the policies of the Act by virtue of the limited duration of Board Member and General Counsel terms.

You ask for "assurances." As I said to your Subcommittee when questioned about the subject a few years ago, I could not change my vote on any issue because of political pressure of any kind without violating my oath of office. And I assure you that I will not violate my oath of office as long as I serve in government.

(2) With respect to the question of whether the Board has approved multi-facility units over a union's wishes, I can inform you that we have done so on several occasions. In *PECO Energy Co*., 322 NLRB 1074 (1997),[1] the Board, contrary to the union, found that neither of two separately located units sought by a union were appropriate for collective bargaining. In *PECO*, the IBEW sought a unit of craft and technical employees at PECO's Cromby generating station, and a similar unit at PECO's Eddystone generating station. The Board concluded that the union had failed to establish that the units were appropriate. Rather, we noted that such units would "unduly fragment PECO's operations." 322 NLRB at 1080. It should also be noted that this case was transferred by the Regional Director to the Board for decision, and the Board decided this unit issue against the union.

Similarly, in *Southern California Edison Co*., Case 31–RC–7303,[2] the Board found inappropriate a union-requested single-facility unit. In that case, the union sought a single unit of customer service representatives at the employer's San Bernadino office. The Regional Director, contrary to the union, found the unit inappropriate, and concluded that only a larger, multi-location unit was appropriate. The union requested review. As noted, the Board denied the request for review, thereby indicating its agreement with the Regional Director's determination against the wishes of the union.

In *Klosterman Bakeries of Indiana, Inc*., Case 25–RC–9525,[3] the union filed a petition seeking to represent drivers at one location operated by the employer. Contrary to the union, the Regional Director found that the employer had rebutted the presumptive appropriateness of the single-facility location. Rather, the Regional Director concluded that the unit must also include drivers located at two other facilities operated by the employer. The Board affirmed the Regional Director's decision, rejecting the union's contentions to the contrary. A similar result obtained in *U.S. Homecare Infusion Therapy Corp. of New Jersey*, Case 22–RC–110 7,[4] albeit by a different path. In that case, the union sought to represent employees at one of the employer's facilities. The Regional Director agreed with the union that such a unit was appropriate. The Board, however reversed the Regional Director's determination. In agreement with the employer, and contrary to the union, the Board found that the single-location facility did not constitute an appropriate unit. Rather, the Board concluded that only a two-location unit, including a facility 60 miles from the one sought by the union, was appropriate. It is thus apparent from this evidence that the Board continues to apply long-standing Board policies, including, when warranted, finding single-location facilities sought by unions to be inappropriate.

Again, in *Technology Service Solutions*, Case 27–RC–7557,[5] the Board reversed a Regional Director's unit finding in favor of the union. In that case, the

[1] Chairman Gould, Members Fox and Higgins.

[2] Order denying review issued August 8, 1995 (Chairman Gould, Members Browning and Truesdale).

[3] Order denying review issued February 7, 1995 (Members Browning and Cohen, Chairman Gould dissenting).

[4] Decision on Review issued February 23, 1995 (Member Stephens and Browning, Chairman Gould dissenting).

[5] Decision on Review and Order issued July 20, 1995 (Chairman Gould, Members Cohen and Truesdale).

finding in favor of the union. In that case, the Regional Director applied the theory of the presumptive appropriateness of a single-facility unit to territories under the supervision of customer service managers (CSMs), and found a unit supervised by certain CSMs to be appropriate. The Board rejected the application of the presumption in that situation, noting that the CSMs' territory could "not realistically be viewed as the equivalent of a single facility." The Board concluded that the unit found appropriate by the Regional Director merely constituted a geographic area, but was not a structure or office. Thus, the Board concluded there was no central location out of which employees worked, and that there was no separate community of interest among the employees in the unit found appropriate by the Regional Director. Rather, the Board found, in agreement with the employer, that only a region-wide unit was appropriate.

In *Cablevision of LongIsland*, Case 28–RC–5254,[6] the Board denied review of the Regional Director's finding, contrary to the union's wishes, that the only appropriate unit consisted of employees at the employer's three cable systems. Significantly, the Board noted in its Order that the Regional Director had failed to apply the presumption that a single facility was appropriate. Nonetheless, the Board concluded that even applying the presumption, the employer had presented sufficient evidence to rebut its application, and agreed with the Regional Director that only a multi-location unit was appropriate.

Other cases, in a memorandum prepared by the Office of Representation Appeals staff, are included in Attachment A.

(3) The two cases cited in your letter—*D&L Transportation, Inc., supra* and *Dattco, Inc., supra*—do not indicate that the Board is applying a new, more rigorous presumption in favor of single-facility units. **Rather, those cases apply traditional Board analysis, and cite Board precedent predating the rule and the tenure of the current Board.** While it is clear from those decisions that individual Board members may occasionally disagree as to the application of the law to a particular set of facts, there is no disagreement as to what the law is. Nor is the Board, sub silentio, applying the previously proposed rule.

In *D&L*, for example, the Board went to great lengths to indicate that it was following existing Board precedent in reaching its decision. It first must be noted in this regard that the employer in that case objected to the union's reliance on the proposed rule. The Board noted that the union's request for review raised substantial issues apart from the union's reliance on the rule. The Board additionally stated that in reaching its determination, "the Board does not rely on the proposed rule or any considerations therein." 324 NLRB No. 31, slip op. at 1, n.2. After reciting the facts, the Board then set forth the applicable principles and standard of analysis. In so doing, the Board cited *J&L Plate*, 310 NLRB 429 (1993),[7] which itself relied on *Dixie Bell Mills*, 139 NLRB 629 (1962). The Board also relied on a 1990 decision, *Esco Corp*., 298 NLRB 837.[8] These three cases were all decided prior to consideration of the proposed rule, and before any of the current Board members' terms.

The decision itself makes plain that it is applying the criteria used by the Board for over three decades in determining whether a single-facility unit is appropriate. The decision painstakingly considered all the facts, and each of the reasons set forth by the Acting Regional Director to support his opinion. Thus, the Board considered the traditional criteria of local autonomy, common skills and functions, interchange, geographic proximity, common policies and procedures, and centralization of labor relations. Evaluating this criteria, the Board concluded that there was local supervisory autonomy; distinctive skills and pay; separate seniority; minimal interchange; and geographic separation. These factors—all traditional ones predating promulgation of the rule led the Board to reverse the Acting Regional Director's decision.

Dattco followed *D&L*. The Board's decision notes that the facts in that case were similar to those in D&L, and the same result should obtain. The Board specifically noted that the terminal manager and dispatcher exercised a high degree of autonomy over day-to-day operations, that there was only minimal interchange, and other facilities were geographically separate. These are traditional criteria, among others, used by the Board for many years in evaluating whether an employer has rebutted the presumptive appropriateness of a single-facility unit.

In sum, it is apparent that contrary to your stated assertion, the Board, in its recent decision-making process, is not carrying out the policies of the prohibited regulations as if they were actually in effect. The precise standards relating to employer rebuttal are set forth in the rule and are not contained in the Board's decisions.

(4) As to the question concerning the Board's reversal of regional decisions in both *D&L* and *Dattco*, I will discuss here, and have attached as an Attachment B, statistics reported to Congress in the Board's Annual

[6] Order denying review issued May 8, 1995 (Members Stephens, Browning and Cohen).

[7] 1993 (Members Devaney, Oviatt and Raudabaugh).

[8] 1990 (Chairman Stephens, Members Cracraft and Devaney).

Reports. In Fiscal Year 1997,[9] parties filed 446 requests for review of regional decisions in representation cases. Twenty-four of these were withdrawn prior to the Board ruling on them. The Board acted on 425 requests for review.[10] The Board granted review in 67 cases, denied review in 346 cases, and remanded 8 cases (1 case was withdrawn after review was granted). Of 62 Board decisions after grant of review, the Board affirmed the regional decision in 33 cases, remanded 8 cases, and reversed the Regional Director in 21 cases. Thus, of all review cases acted on by the Board in 1997, the Board reversed the region five percent of the time. When remands are added into the equation, that percentage rises to seven. And measured against only those cases in which the Board granted review, the Board reversed regional decisions 21 out of 62 times—34 percent (47 percent when remands are added in to the equation). Similar numbers are revealed by analysis of Fiscal Year 1996, as set out below.[11] It is thus clear that, while not taking its regional determinations lightly, the Board has not hesitated to correct improper decisions. It is not relatively uncommon for the Board to grant review to evaluate a region's decision more thoroughly—that is done in about 15 percent of the cases—and it is not uncommon for the Board, on review, to disagree with a region's determination.

I also assure you that no Regional Director would react to the subject opinions by approving unions' requests for single-facility units simply to avoid being reversed by the Board. First, our Regional Directors, and regional personnel as a whole, are dedicated professionals and civil servants who perform a difficult task under trying circumstances (and with minimal resources!) to the best of their ability every day. Second, and more importantly, the Board oversees all its regions, and performs its statutory task by reviewing the representation cases these regions process. That the Board occasionally reverses a regional determination, where that determination is incorrect, does not chill the regions' dedication or ability to act. The law is on the books. Indeed, the General

Counsel has recently updated the Agency's representation manual, *An Outline of Law and Procedure in Representation Cases*. That manual sets forth, among other things, the principles applicable in the area of requested single-location units. See Chapter 13, pp. 183–191. There is no danger that, simply because some Board Members perceive the facts differently from other members and its Regional Directors, that the decisions will not be reached on the facts and law. Since *D&L* itself makes plain the Board is not applying the rule, and the Agency's own Outline also so indicates, I do not believe it necessary or appropriate to inform the Regional Directors in writing in response to your directive that their determinations on requested single-facility units will be handled in accordance with the proper rules—they already have been so informed, and I reject any implicit suggestion that improper or forbidden considerations have in any way influenced our decisions.

Again, I reiterate that any attempt by the Chairman or by the Board to issue such instructions pursuant to your request would be inconsistent with our responsibilities as an independent administrative agency with quasi-judicial responsibilities.

In conclusion, let me assure you that the Board is carrying out the mandates of the Act and, specifically, the prohibition of P.L. 105–78. As explained above, the Board and its Members continue to apply long-standing precedent and policies.

Thank you for your interest in this matter. I would be pleased to meet with any members of the Subcommittee should you desire to discuss this further.

Sincerely,

/s/ William B. Gould IV

Chairman

Enclosures: (2)
Attachments A (Attachment B omitted)

Attachment A

The Board has shown a ready willingness to grant review of Regional Directors' opinions applying the presumption and finding appropriate single-facility units, even if the Board ultimately agrees with the Regional Directors' results. Thus, in *Sears, Roebuck & Co.*, Case 9–RC–16692,[1] the Board granted review of the Regional Director's finding that a single facility sought by the

[9] The statistics for Fiscal Year 1997 are only preliminary, may be revised for accuracy prior to submission to Congress in the Board's 1997 Annual Report. Nonetheless, I will discuss them here because the subject cases arose in that year, and I do not believe that there will be much, if any, variance from the preliminary data used here.

[10] The slight difference in numbers from those received compared to those acted on reflects the fact that some requests that were filed in 1996 were acted on in 1997, and some 1997 requests were not yet evaluated

[11] In Fiscal Year 1996, parties filed 405 requests for review. Forty-one of these were withdrawn before Board action. The Board ruled on 370 request for review: it granted review in 60 cases, denied review in 302 cases, and remanded in 4 cases; one case was withdrawn. The Board issued 53 decisions, in which it affirmed the regional determination in 15, remanded in 7, and reversed in 31 cases. Thus, the Board reversed the region in over 8 percent of all cases considered (10 percent when remands are factored in). As a percentage of actual Board decisions after grant of review, the Board reversed regional opinions 58 percent of the time.

[1] Order granting review issued May 23, 1996 (Members Browning, Cohen and Fox).

union was appropriate. The Board believed the employer's request for review raised substantial issues warranting closer analysis of the Regional Director's opinion. Upon careful consideration of the entire record of the proceedings, including the transcript of the hearing, the Board ultimately agreed with the Regional Director's decision.[2] Similarly, in *Farley Foods, U.S.A.*, Case 13–RC–19105,[3] the Board granted review of the Acting Regional Director's finding that the unit sought by the union—unit of warehouse employees at a separate location—was appropriate. The Board granted review and examined the record to ensure that the Region had reached the correct result. Based on its careful review, the Board affirmed the unit finding. And in *R.B. Associates, Inc.*, Case 5–RC–14470,[4] the Board granted the employer's request for review of the Regional Director's finding, in agreement with the union, that a unit of employees at a single hotel operated by the employer was appropriate. Five months later, after a thorough review, the Board ultimately issued a published opinion affirming the Regional Director's finding.[5]

These opinions show the Board's willingness to look at all sides in this delicate area, and to give employer requests for review the same detail of attention it gives to union requests for review. There are two other cases which should be mentioned before leaving this topic. Although the case still is pending before the Board for decision, we believe it worth noting that the Board recently granted review of a Regional Director's finding that a union-sought single-facility unit was appropriate. In *American Medical Responses-Mid-Atlantic, Inc.*, Case 4–RC–19257, the Regional Director found appropriate a

[2] Decision on Review issued September 13, 1996 (Chairman Gould, Members Browning and Fox).

[3] Order granting review and affirming Acting Regional Director in material respects issued May 24, 1995 (Chairman Gould, Members Stephens and Truesdale).

[4] Order granting review issued May 23, 1997 (Chairman Gould, Members Fox and Higgins).

[5] Decision on Review and Order reported at 324 NLRB No. 138, issued October 30, 1997 (Chairman Gould, Member Fox and Higgins).

ATTACHMENT E

ENFORCEMENT RATES
FY 1990 Through First Half of FY 1998

Year	Full Enforcement	Partial Enforcement	Total
1990	78.9	9.9	88.8
1991	76.4	10.1	86.5
1992	73.3	10.6	83.9
1993	78.2	10.6	88.8
1994	62.7	16.2	78.9
1995	60.8	11.7	72.5
1996	65.8	18.1	83.9
1997	70.0	13.8	83.8
1990–1997 avg.	70.8	12.6	83.4
1998– 1st Half	70.9	17.7	88.6

single-facility unit of emergency medical technicians at one of the employer's terminals. The employer requested review, arguing that the unit must also include employees at three other terminals. The Board[6] granted the employer's request for review, and is currently evaluating whether the Regional Director reached the correct result. In *AVI Vending*, Case 9–RC–17019,[7] the Regional Director, applying single-facility presumption, found that a unit of employees at one cafeteria operated by the employer at a defense installation in Columbus, Ohio, was appropriate, contrary to the employer's argument that the unit must also include employees working at another food service facility at the installation. The Board agreed that the employer's request for review raised substantial issues warranting review of the Regional Director's evaluation of the traditional criteria.

In sum, the Board has applied, and continues to apply, its historical policies regarding evaluation of whether single-facility units are appropriate.

[6] Corrected Order granting review issued January 13, 1998 (Members Liebman, Hurtgen and Brame).

[7] Order granting review issued February 27, 1998 (Chairman Gould, Members Hurtgen and Brame).

ATTACHMENT F

SELECTED CASES ISSUED DURING CHAIRMAN GOULD'S TENURE

REPRESENTATION CASES AND ORGANIZATIONAL ACTIVITIES

In Sunrise Rehabilitation Hospital, 320 NLRB 212 (December 19, 1995), the Board held that monetary payments, that are offered to employees by unions or employers, as a reward for coming to a Board election, and that exceed reimbursement for actual transportation expenses, amount to a benefit "that reasonably tends to influence the election outcome." Accordingly, the Board overruled established precedent. [1] It noted that the standard for whether the offer of pay or monetary benefits is objective and not subjective, i.e., ". . . whether the challenged conduct has a reasonable tendency to influence the election outcome." The Board further stated that it takes into account, ". . . such factors as the size of the benefit in relation to its stated legitimate purpose, the number of employees receiving it, how the employees would reasonably construe the purpose given the context of the offer, and its timing."

On the other hand, in Good Shepherd Home, 321 NLRB 426 (May 31, 1996), the Board found that a good faith payment designed to reimburse for transportation expenses is not objectionable. Said the majority: "As long as the reimbursement is clearly related only to actual travel expenses, and the party has made a good faith effort to estimate those expenses, we will conclude that the party has not engaged in objectionable conduct."[2]

In Arizona Public Service Company, 325 NLRB No. 137 (May 4, 1998), a Board majority, Chairman Gould and Member Hurtgen, held in separate opinions that an employer did not engage in objectionable conduct by conducting an election-day raffle for employees voting in the election. Chairman Gould disagreed with the Board's prior approach to determining if an election-day raffle is objectionable, i.e., consideration of whether the raffle prizes are of a substantial nature, and stated his view that "the Board should modify its analysis . . . . to place primary consideration on whether the employer has, in the past, held raffles of a similar nature for employees." Because the record failed to show that the employer's raffle was inconsistent with past practice, Chairman Gould found the raffle not objectionable.

Member Hurtgen applied the existing precedent of considering all attendant circumstances, including the value of the prizes, in determining whether the raffle was objectionable. In his view, there was no evidence linking the raffle to how the employees voted, and with 928 unit employees and prizes worth $4000, the value of the raffle ticket was about $7 and thus not so substantial as to interfere with employee free choice.

In a dissent, Member Liebman also applied existing precedent, but found the raffle objectionable because the prizes worth $4000 "were so substantial as to both divert the employees' attention away from the election . . . and to inherently induce eligible voters to support the employer's antiunion position by voting against the [union]." Member Liebman further found that the manner in which the raffle was announced, i.e., in a flyer exhorting employees to vote against the union, had the tendency to induce employees to vote against the union.

In Gormac Custom Mfg. Inc., 324 NLRB No. 80 (September 22, 1997), the Board rejected the employer's contention that a representation election won by the union should be set aside on the basis of the union's preelection circulation of a leaflet with the names of unit employees indicating their support for the union. The employer argued that the leaflet was objectionable as a breach of employee confidentiality and as a deception that fell within the forgery exception to the Board's Midland doctrine[3] because the names had been copied from documents originally signed by employees who were unaware that they were authorizing the union to publicize their support of the union. In rejecting this argument, the Board noted that the documents originally signed by the employees "expressly authorized the [union] to sign their names to union leaflets." In view of this clear language, the Board deemed irrelevant the employer's claim that oral misrepresentations had been made to employees concerning the use of their names.

In Kalin Construction Company, Inc., 321 NLRB 649 (July 8, 1996), the Board adopted a new rule, similar to the anti-captive audience approach endorsed four decades ago prohibiting eleventh-hour captive audience speeches in Peerless Plywood,[4] by prohibiting other forms of last minute campaign tactics. In this case, employees could only gain access to the voting area by entering through an area where, contrary to past practice, the company handed them their pay envelopes. Here, each employee received two checks for the pay period whereas in the past one paycheck per pay period had been issued. One was for the amount the employer claimed the employees would receive under union representation. The other was for the amount the employer claimed would be sent to the union.

In Kalin, the Board concluded that, because last minute campaign speeches and electioneering and changes

[1] Young Men's Christian Association, 286 NLRB 1052 (1987).

[2] Member Cohen dissented in this case as well as Sunrise Rehabilitation.

[3] Midland National Life Insurance Co., 263 NLRB 127 (1982).

[4] 107 NLRB 427 (1953).

in the paycheck process have an unsettling impact on employees and disturb the laboratory conditions which are a prerequisite for a fair election, a change in the paycheck, paycheck distribution, the location or method of the paycheck distribution would be a basis for setting the election aside. It noted that, if a change in the paycheck process was motivated by a "legitimate business reason unrelated to the election," the new rule would not be violated. The Board sounded a theme that is similar to much that they have done elsewhere, i.e., an additional virtue of this approach was that it was both understandable and predictable and, therefore, would be less likely to give rise to ". . . extensive litigation, delay, and rulings that are difficult to reconcile."

Another important issue involving organizational tactics arose in Novotel New York, 321 NLRB 624 (July 8, 1996), where a union commenced an organizational drive among hotel workers in the midst of complaints about alleged irregularities involving the payment of overtime wages to the workers. A suit alleging violations of the Fair Labor Standards Act of 1938 was filed in Federal District Court by the union, which was represented by outside counsel. Consent forms were signed and filed. The issue presented was whether the union's litigation was a "benefit" which interfered with the conduct of the election.

In Novotel, the Board noted that, historically, unions have undertaken a wide variety of actions and tactics to protect and advance the rights of workers. Assessing a wide variety of subjects with which unions have been concerned, it observed that unions have used training programs, litigation, and the advocacy and monitoring of legislation to advance their goals.

The Board noted the freedom of association cases in which the United States Supreme Court held that First Amendment protection applies to advocacy which sometimes takes place in the context of litigation. It held that constitutional and statutory precedent provided protection for both members and nonmembers in an organizational campaign and that protection was not removed ". . . the moment the union took the next logical step and sought financially or otherwise to assist nonmembers in gaining access to the Courts for vindication of their lawful rights." The major employer argument in Novotel was that, notwithstanding the protection afforded employees, the result of litigation by the union was an objectionable grant of benefit which would warrant setting the election aside. Said the Board:

> [W]e would be standing the statute on its head if we were to set the election aside on the ground that the legal services [provided by the union to] . . . employees were a 'financial benefit to which they would otherwise not be entitled' . . . . Because the Act protects the Petitioner's conduct, we conclude that the legal services it provided Novotel employees were a benefit to which they were entitled under national labor policy.

The Board noted the employees' lack of familiarity with the legal process and remedies, and their lack of financial resources. It observed that resorting to the judicial process might well have been "fruitless" without union assistance. Said the Board: "The Petitioner here did precisely what the Act intended labor organizations to do: it aided employees engaged in concerted activity."

In Shepherd Tissue, Inc., 326 NLRB No. 38 (August 26, 1998), the Board majority, Members Fox and Liebman, adopted the Hearing Officer's recommendation to overrule the employer's objections to the election. The employer's Objection 2 alleged that the union had injected racial considerations in the campaign in such a way as to destroy the laboratory conditions necessary for a valid election. The Hearing Officer found that the union's campaign handbill which included a statement by a discharged unit employee concerning a sexual harassment investigation that "black folk have been wrongly touched by whites for over 300 years," was not objectionable under Sewell Mfg. Co., 138 NLRB 66 (1962).

In a concurring opinion, Chairman Gould stated that while the basic principles of Sewell are correct, he does not subscribe to the holding of Sewell and its progeny that places the burden on the party making the racial appeal, requires that the appeal be truthful and creates an inappropriate symmetry between unions and employers. In his view, regardless of whether the appeal is made by the employer or the union, the burden should be on the objecting party to establish that a racial remark is designed to incite racial hatred. He also stated that the truth or falsity of the racial appeal is irrelevant to the determination of whether it rises to the level of objectionable conduct.[5] He observed that an erroneous statement is inevitable in free debate, but such statements must be protected if freedom of expression is to retain the "breathing space" it needs to survive.[6] He noted that racial protests and grievances—and those about sexual discrimination and other forms of alleged arbitrary treatment—are properly promoted, not smothered and suppressed, by the statutory scheme which the Board administers. Further, Chairman Gould observed that placing the burden on the party seeking to have the

[5] Chairman Gould noted that his view is consistent with the Board's refusal to inquire into the truth or falsity of parties' campaign statements in general or set aside elections on the basis of misleading campaign statements. Midland National Life Ins. Co., 263 NLRB 127 (1982).

[6] New York Times v. Sullivan, 376 U.S. at 271–272 (1964) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

election set aside and eliminating the requirement that the truthfulness of the racial remarks be established, diminishes the potential for wasteful litigation that is now present in this area.

Because of the employer's economic power and control of the employment relationship, Chairman Gould noted that the Board's concerns about racial appeals expressed in Sewell have peculiar applicability to remarks of employers as opposed to those of unions and their representatives. In cases involving employers, like Sewell, Chairman Gould observed that employers attempted to divide workers on the basis of racial appeals unrelated to working conditions and the workplace and to frustrate the possibility of effective concerted activity. While he stated that he would condemn similar union appeals designed to divide workers through racial hatred, Chairman Gould noted that generally speaking, union organizational efforts aimed at blacks and other racial minorities and women must necessarily focus, in part, upon grievances peculiar and unique to such groups, i.e., employment conditions which are attributable to racial inequities or what appear to be racial inequities and other forms of arbitrary treatment.

In the instant case, Chairman Gould observed that while the statement in thePetitioner's handbill suggests a racial message, it also raises valid workplace issue and credited evidence established that the issues of common concern to employees included wages and benefits, worker safety, equal treatment of employees and unjust discharges of employees. Appeals based on racial solidarity or expressions of grievance based on racial discrimination are indistinguishable from appeals to employees' economic and social self-interest which the Board has long recognized as a legitimate tactic in any union organizing campaign. In Novotel New York,[7] the Board recognized that, under the statutory scheme of the Act, unions have an essential role in assisting workers in the exercise of their Section 7 rights to better their working conditions and, to fully play this role, unions engage in a broad range of activity on behalf of both the employees they represent as well as the employees they are seeking to organize.

Questioning whether the election would be set aside if the Petitioner had instituted litigation or offered legal advice with or without the prospect of litigation to employees in the bargaining unit pursuant to Title VII of the Civil Rights Act of 1964 and related employment discrimination legislation, Chairman Gould stated that *Novotel* makes it clear that, unless the Board will treat employment discrimination differently than other employment problems and litigation or accord it less status, the answer is in the negative. According to Chairman Gould, the principles of Novotel make it clear that the promotion or acknowledgment of employee grievances, racial or otherwise, are appropriate under the Act.

While he agrees that racial discrimination and sexual harassment are complex problems, Chairman Gould stated that the answer is not to discourage open debate where these issues concern employees' working conditions and he observed that the reality of the workplace is that discussions between employees, unions, and management is frequently rough and tumble, but the Board cannot and should not function as a censor of these debates over issues germane to the employment relationship. Under Chairman Gould's view, until the rhetoric reaches the point at which it is no longer relevant to the discussion of unionization and is intended only to promote an atmosphere of racial hatred, the Board should not condemn racial appeals.

EMPLOYEES AND COMMUNITY OF INTEREST

In PECO Energy Company, 322 NLRB 1074 (February 14, 1997), the Board held that the general rule in favor of systemwide units of public utilities does not operate as an absolute prohibition of smaller units. In this case, the Board stressed that PECO through its own reorganization had identified the power generation group as a well-defined administrative segment of the organization that could justify a smaller than systemwide unit. The Board found the same to be true of the nuclear generation group.

In Speedrack Products Group Limited, 325 NLRB No. 109 (April 9, 1998), a case on remand from the United States Court of Appeals for the District of Columbia Circuit, the Board reconsidered its earlier decision, reported at 320 NLRB 627 (1995), in which a majority had held that work-release inmates did not share a community of interest with the regular "free-world" unit employees, and were ineligible to vote. Chairman Gould dissented from that earlier decision, stating that he would find the work release employees eligible under the Board's decisions in Winsett-Simmonds Engineers, Inc., 164 NLRB 611 (1967), and Georgia Pacific Corp., 201 NLRB 760 (1973), which represent the Board's determination that whether work-release employees share a community of interest with their fellow employees depends on their status while in the employment relationship and not on the ultimate control they may be subjected to at other times. In remanding the case to the Board, the D.C. Circuit agreed with Chairman Gould's dissenting opinion, finding that "work-release employees were 'completely integrated' into Speedrack's workforce," and "[t]hus under Winsett-Simmonds and the Board's other cases, Speedrack's employees appear to share a community of interest and to be eligible to vote in the representation election." Speedrack Products

[7] 321 NLRB 624 (1996).

Group, Ltd. v. NLRB, 114 F.3d 1276, 1282. In accepting the remand, the Board stated that it had reconsidered its original determination regarding the work-release employees and, in agreement with Chairman Gould's dissent in the underlying representation case, decided to apply Winsett-Simmonds to find that the work release employees share a sufficient community of interest with the unit employees.

In a separate opinion, Chairman Gould noted that any correctional authority constraints on work release employees are irrelevant to the community-of-interest analysis where those constraints do not differentiate work release employees from other employees in their relationship to their employer. In Chairman Gould's view, the consideration of constraints on the rights of work release employees to strike as a factor in finding community of interest assumes an adversarial approach to industrial relations and ignores the movement toward workplace cooperation that he has long supported. Chairman Gould also stated that the primary thrust of labor policy ought to be upon more rational and cooperative avenues for labor and management to pursue and that strikes and picket lines, while part of the statutory scheme, should be a measure of last resort as a practical matter. Thus, in his view, the Board should remain faithful to the thrust of his dissent and the Court of Appeals decision and measure community of interest through integration into the employment relationship itself.

Member Fox indicated that she would modify the test set out in Winsett-Simmonds by expanding it beyond its narrow focus on factors defining the employment relationship while the work release employees are actually on the job and would consider the constraints, if any, placed on work release employees' freedom to attend union meetings after working hours, to participate fully in the collective-bargaining process and to engage in other collective efforts to affect workplace conditions.

The supervisory status of charge nurses employed in hospitals and nursing homes has spawned considerable litigation and, indeed, has been the subject of controversy at the Board for years.[8] In two lead cases, on the basis of the evidence presented in each case, the Board found that disputed charge nurses were not statutory supervisors within the meaning of the Act. In Providence Hospital, 320 NLRB 717 (January 3, 1996), enfd. 121 F.3d 548, 156 LRRM 2001 (9th Cir. 1997), the Board stated that the record evidence did not establish that charge nurses' assignments of registered nurses was anything more than a routine clerical task and that their direction of employees did not require the use of independent judgment within the meaning of Section 2(11). The Board noted that while the charge nurses exercised considerable judgment in assessing patients' conditions and treatment, this was a part of their professional judgment shared by all staff registered nurses. Similarly, in Ten Broeck Commons, 320 NLRB 806 (February 2, 1996), the Board held that licensed practical nurses serving as charge nurses in a nursing home were not statutory supervisors. Again, in connection with assignment and direction, the question was whether the direction required the use of independent judgment or involved directions which were merely routine.

In another recent case, the Board addressed the issue of whether professional employees possess supervisory authority over nonunit support personnel. In Legal Aid Society, 324 NLRB No. 135 (October 21, 1997), the Board was confronted with the issue of whether four of the Society's attorneys should be excluded from the petitioned-for unit of attorneys on the ground that they exercise statutory supervisory authority over nonunit law clerks, paralegals and/or clericals or otherwise exercise statutory supervisory authority. Members Fox and Higgins in the majority opinion, adhered to Detroit College of Business[9] in which the Board held that a number of factors should be appropriately taken into account in determining whether professionals possess supervisory status which would exclude them from statutory coverage. The majority found that attorneys should be excluded who supervise paralegals on the ground that the individuals' work is comparable to part-time faculty members in Detroit College. In Legal Aid, the Board majority said that the functions of one attorney were not "ancillary to her professional duties as an attorney" and because of the independence of such nonunit individuals they could not be regarded as support personnel which might provide the basis for an exception to supervisory status.

In a concurring and dissenting opinion, Chairman Gould stated that, because of the confusing and wide variety of separate factors set forth in Detroit College, that decision should be overruled. But he endorsed the principle that the professionals who only supervise nonunit support employees could be included in the professional bargaining unit. Chairman Gould stated that there is no divided loyalty problem—the basis for supervisory exclusion—because the professional supervisory authority is set apart from their "primary interest as employees in professional matters and concerns." He expressed the concern that Detroit College would deprive employees of their rights and protections under the Act and was contrary to the purpose of the Act.

[8] See NLRB v. Health Care & Retirement Corp., 114 S. Ct. 1778 (1994); Northcrest Nursing Home, 313 NLRB 491 (1993); and cases cited therein.

[9] 296 NLRB 318 (1989).

In a related case, Rite Aid Corp., 325 NLRB No. 134 (April 30, 1998), a Board majority of Members Fox and Hurtgen, found, contrary to the Regional Director, that the pharmacists who hold the position of "pharmacy managers" and who supervise pharmacy technicians, are properly excluded from the unit of pharmacists and interns under the standard set forth in Detroit College. Consistent with his Legal Aid position, Chairman Gould dissented in part, noting that even assuming that the pharmacy managers possess statutory supervisory authority over the pharmacy technicians, the pharmacy managers should be included in the unit because their supervision only extends to nonunit support personnel.

In Union Square Theatre Management, 326 NLRB No. 17 (August 17, 1998), the Chairman applied his views in Legal Aid and Rite-Aid to a nonprofessional setting in dissenting from the majority's finding that "technical directors" (TDs) who worked at four off-Broadway theatres were supervisors.

The respondent in Union Square provided theatrical management services to the four theatres. In this capacity, it hired a TD at each theatre to perform various functions such as interacting with touring show personnel regarding technical matters affecting theatre production (e.g., advising on weight limits for hanging stage equipment) and to perform maintenance and repair services such as painting theatre seats and replacing burned out stage lighting.

Members Fox and Hurtgen found that the TDs were supervisors based on their occasional hiring of outside assistance to complete the maintenance tasks. Accordingly, they dismissed complaint allegations that the respondent violated Section 8(a)(1) by making coercive statements to two TDs and violated Section 8(a)(3) by discharging one of them.

In dissent, the Chairman reiterated his position in Legal Aid and Rite Aid that individuals who supervise nonunit personnel should not be considered supervisors because they present no "divided loyalty" or conflict of interest problem between themselves and management or between themselves and the nonunit people whom they supervise. That no such problem existed in this case was evidenced by the minimal frequency in which TDs hired casual outside help and the fact that the casuals, because of their short-term tenure with the respondent (sometimes lasting only a few days), precluded their inclusion in the same unit with the TDs. Accordingly, the Chairman concluded that the TDs were not supervisors and that he would adopt the violations found by the judge and the Gissel bargaining order that was directed to remedy the violations.

In a case involving whether limousine drivers were employees or independent contractors, Elite Limousine Plus, Inc., 324 NLRB No. 182 (Nov. 6, 1997), the Board, Chairman Gould, and Members Fox and Higgins, affirmed the Regional Director's Decision and Direction of Election which found that the employer's limousine drivers are employees within the meaning of Section 2(3). The employer "sells" franchises to limousine drivers who are then dispatched fares by the employer through an on-board computer system. Upon a review of the record, the Board determined that the employer retained control over most of the franchises it issued and that the level of entrepreneurial activity was insubstantial. The Board relied on evidence that most franchises were leased not owned and that the employer discouraged entrepreneurial activity by precluding employer repurchase of a franchise if it is sold to a third party. In addition, the Board noted that the Regional Director had relied on extensive evidence of the employer's right to control the limousine drivers.

In General Security Services Corporation, 326 NLRB No. 42 (August 25, 1998), the Board majority of Chairman Gould and Members Fox and Liebman found, contrary to the Administrative Law Judge, that Charging Party Cracolici, was not a supervisor within the meaning of Section 2(11) of the Act and that his transfer, demotion, suspension, and termination for engaging in union activities therefore violated Section 8(a)(3) and (1) of the Act. In finding that Cracolici was not a supervisor, the majority found that his changes to employee work schedules did not involve the exercise of independent judgment and that his issuance of two oral reprimands which had no effect on the employees' jobs did not amount to disciplinary authority. Having found no primary indicia of supervisory authority, the Board majority found that the secondary indicia (higher compensation and the like) cited by the judge were not determinative. The majority then concluded, under Wright Line,[10] that the General Counsel had established that union activities were a motivating factor in the Respondent's decision to discipline and ultimately terminate Cracolici and that the Respondent had failed to carry its burden of showing by a preponderance of the evidence that it would have taken the same actions in the absence of Cracolici's union activities.

Chairman Gould, in a concurring opinion, stated that he would also have found violations of Section 8(a)(1) even if Cracolici were a statutory supervisor.

The Chairman thus announced that he does not subscribe to the test to resolve supervisory discharge cases set forth in Parker-Robb Chevrolet.[11] In that case, the Board held that while the discharge of a supervisor for

[10] 251 NLRB 1083 (1980), affirmed, 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982).

[11] 262 NLRB 402 (1982), affd. sub nom. Automobile Salesmen's Union Local 1095 v. NLRB, 711 F.2d 888 (D.C. Cir. 1988).

engaged in union or concerted activity has a secondary or incidental effect on employees in most cases, such an effect does not warrant an exception to the general statutory exclusion of supervisors from the protection of the Act. The Chairman asserted that he holds a different view of the Act. He stated:

> discrimination by an employer that has the effect of coercing employees to abandon their protected or union activities should never be construed as lawful on the ground that the employees' abandonment of protected or union activities is merely an 'incidental or secondary effect' of such discrimination. To the contrary, the chilling of employees' rights to organize and to participate in union activities goes to the very heart of the Act and undermines the very employee rights which the Parker-Robb Board purported to protect. In this regard, I find it inherently contradictory for the Board to rely on the proposition that 'employees, but not supervisors, have rights protected by the Act,' when the result of such a reliance is to leave employers free to chill the rights of statutory employees with impunity.

The Chairman found that the Respondent's discharge of Cracolici specifically because of his union activities chilled employees' exercise of statutory rights because employees could reasonably fear they also would be discharged if they persisted in their efforts to seek union representation.

Chairman Gould also found that even when the supervisor's discharge does not have a chilling effect on other employees, a supervisor may still enjoy the protection of the Act in certain circumstances. The Chairman found that where an individual's supervisory status is uncertain and is contested before the Board in a union organizational campaign, the individual does not lose the protection of the Act if he is subsequently determined to be a statutory supervisor. Noting that a dominant purpose of Section 2(11) is ensure that supervisors' loyalty to their employers interests is not impaired by identity with the interests of rank-and-file employees, Chairman Gould reasoned that the protection of the union activities of individuals whose supervisory status is uncertain at the time they engage in such activities does not impair supervisors' loyalty to management because the obligation to be loyal is not yet clearly established. The Chairman found that under current law, the employee whose supervisory status is in doubt "must risk everything when, upon an employer's mere assertion that the employee is a supervisor, the employee must choose either to surrender his Section 7 right to engage in protected or union activity or to subject himself to possible discharge by continuing to engage in that activity....I would remove this risk by finding unlawful an employer's demand that an employee cease his protected or union activity and any discipline imposed if the action was taken as a result of such activities prior to a Board determination of his job status." Chairman Gould concluded that the facts in this case did not warrant this approach, however, because Cracolici's status was not contested in the union's organizational campaign.

Members Hurtgen and Brame dissented, finding that the judge correctly determined that Cracolici was a statutory supervisor. They relied on the facts that Cracolici was in charge of courthouse security for approximately 4.5 hours each day, that he scheduled and assigned work when his superior was absent, that he had the authority to assign overtime and that he had the authority to act for the Respondent if an emergency arose.

PROCEDURES IN REPRESENTATION CASES

In Bennett Industries Inc., 313 NLRB 1363 (June 3, 1994), a unanimous Board held that where an employer did not take a position about an issue in dispute in a representation hearing, the hearing officer properly refused to allow the employer to introduce evidence as to that issue and that it would be inappropriate to permit relitigation of the same issue to the challenged ballot process. Said the Board:

> [I]n order to effectuate the purposes of the Act through expeditiously providing for a representation election, the Board should seek to narrow the issues and limit its investigation to areas in dispute.

And in Angelica Healthcare Services Group, Inc., 315 NLRB 1320 (January 18, 1995), a unanimous Board held that a hearing in some form is required prior to the time that the election takes place. From a policy perspective, the Chairman's view is that employees should have ballots in most instances before a hearing so that representation matters may be resolved expeditiously and so that the electorate does not lose faith in the prompt delivery of the protections provided by the Act. But under the statute, a "hearing" is required—although it was not addressed in Angelica precisely how one would define a hearing.

The Board again considered the proper scope of a representation hearing in Heartshare Human Services, 320 NLRB 1 (December 13, 1995), enfd. 108 F.3d 467, 154 LRRM 2690, (2nd Cir. 1998). There, the Board denied review of a Regional Director's refusal to allow the employer to relitigate the appropriateness of a single-facility unit, where that same issue was litigated at length only about 1 month earlier in another proceeding involving a different facility of the employer's. In both proceedings, the employer asserted that only a multi-facility, employer-wide unit was appropriate. The Board agreed with the Regional Director that, in these circum-

stances, the employer properly was limited to introducing evidence of changed circumstances, and could not introduce evidence that was or could have been produced at the prior hearing.

More recently, in Mariah, Inc., 322 NLRB 586 (November 25, 1996), the Board emphasized that the role of a hearing officer in a representation proceeding is to ensure a record that is concise as well as complete. In Mariah, the Board found that the hearing officer correctly exercised her authority to exclude irrelevant evidence and to limit a party to an offer of proof.

Another closely related issue is the challenged ballot procedure that the Board has recently discussed with its Advisory Panel. Traditionally, the Agency's policy has been to approve election agreements between the parties that provide for up to ten percent of the voting group to vote under challenge. These employees' eligibility and unit inclusion then is resolved after the election, either through subsequent Board proceedings, or by post-election agreement. Where placement or status questions are raised to the Board in pre-election proceedings, the Board traditionally has followed a policy of permitting up to approximately fifteen percent of the voting group to vote under challenge. The Board and most parties deem this to be preferable to having extensive pre-election litigation that would delay the ballot and/or the count. In early 1994, shortly after its confirmation by the Senate, the Board proceeded to a ballot where 33 percent of the voters in one unit, and 22 percent of the voters in a second unit, were in dispute. See North County Humane Society, 21–RC–19324, review denied April 14, 1994. The theory behind this approach is that where the numbers of employees in dispute is manageable, it may be unnecessary to resolve such disputes even after the ballot is taken because the numbers may not affect the outcome of the election. This also proved the case in Columbia Hospital for Women Medical Center, Inc., Case 5–RC–14033, at a time when the anticipated ratio of challenged ballots was 37.5 percent. Similarly in Baltimore Gas & Electric Company, Case 5–RC–14351, the Board went on to an election when 21 percent of the ballots were in dispute. Since the challenged number was 700, the election would have been delayed some period of time—and again the numbers in dispute were not determinative.

In The Glass Depot, Inc., 318 NLRB 766 (August 25, 1995), a plurality of two members held that whenever a "representative complement" had voted, acts of nature, such as snowstorms, would not result in a re-run election. Chairman Gould concurred with the result but stated that, as with political elections, the ballot should not be upset because a snowstorm prevented some employees from casting their ballots. An act of nature or a *force majeure* should be immaterial. Again, the Chairman's concern here and elsewhere is with the uncertainty arising out of the question whether a "representative complement" has voted in every instance of *force majeure* and the litigation and uncertainty that arises out of such imprecision.

The theme of Chairman Gould's concurring opinion—and one consistent with the handling of representation cases and rulemaking proposals, settlement judge procedures and numerous positions outlined in the Jurisdiction, Voluntary Resolution, and Bargaining Relationships, as well as Employee Participation sections outlined below—is to promote certainty and avoid wasteful litigation.

In Bishop Mugavero Center, 322 NLRB 209 (September 27, 1996), a majority upheld the Regional Director's recommendation that a ballot marked with an "X" in the "No" and a diagonal line in the "Yes" box be considered void and therefore not counted. The majority relied upon "well-established Board precedent" which says that where a voter marks both boxes on a ballot and the voter's intent cannot be ascertained from other markings on the ballot, the ballot is void. Chairman Gould dissented on the ground that the "No" box had a completed mark and that therefore the voter intended to register a "No" vote rather than a "meaningless gesture of indecision."

The U.S. Court of Appeals for the Ninth Circuit has indicated its agreement with Chairman Gould's position in Bishop Mugavero. In TCI West, Inc. v. NLRB, 145 F.3d 1113, 158 LRRM 2526 (9th Cir. 1998), denying enf. to TCI West, Inc., 322 NLRB 928 (1997), the court agreed with Chairman Gould's dissenting opinion in the underlying representation case and found that the voter clearly intended to cast a "No" vote where the ballot was marked with one incomplete line in the "Yes" box and a dark, obviously emphasized, complete "X" in the "No" box.

In Dobbs International Service, Inc., 323 NLRB No. 198 (June 30, 1997), the Board majority, Members Fox and Higgins, denied review of the Regional Director's decision, rejecting the union's argument that the Board extend the period in which a contract acts as a bar to a representation petition from three to four years.

In a dissenting opinion, Chairman Gould stated that the Board should reconsider its contract bar rule in light of recent trends in the duration of contracts. Citing statistics that indicate an increase in the number of contracts of duration of four years or more, Chairman Gould indicated that he would consider extending the contract bar period. Although he acknowledged that any extension of the contract bar imposes a restriction on employee freedom of choice, Chairman Gould stated that, in the interest of industrial stability, the Board should reexamine its current policy with respect to the duration

of contracts as bars to petitions based on the relevant economic considerations, different practices within different industries, and briefs and memoranda from labor and management representatives and amici.

In Best Western City View Motor Inn, 325 NLRB No. 215 (July 27, 1988), a Board majority, Chairman Gould and Members Fox, Liebman, and Brame, outlined the circumstances in which contempt proceedings should be instituted in the event of noncompliance with an enforced *ex rel* subpoena. In its objections, the employer contended that union agents visited employees Mahomed Khan Shah (Shah) and Sartaj Khan (Khan) at their homes prior to the election and threatened to create "trouble" for them if they did not vote for the union. In support of its objections, the employer presented affidavits by the two employees but could not procure their attendance at the hearing. The employer argued that it requested the hearing officer and the Region to initiate contempt proceedings against Shah for his failure to comply with a district court order enforcing the subpoena. However, the employer's attorney had also failed to appear at the hearing and therefore offered no evidence that such a request had been made and did not request a continuance of the hearing for the purpose of obtaining the absent witnesses' testimony.

Referring to Section 102.31(d) of the Board's Rules and Regulations, the Board majority concluded that although this regulation does not expressly set out the procedure for initiating subpoena enforcement contempt proceedings, it will best effectuate the policies of the Act to follow the same rule applicable to the Board's institution of subpoena enforcement proceedings. Accordingly, upon the request of the party on whose behalf a subpoena was issued and enforcement proceedings were instituted, the Regional Director must initiate contempt proceedings in the U.S. district court upon noncompliance with an enforced subpoena unless contempt proceedings would be inconsistent with the law and policies of the Act. The majority stated:

> The Board institutes enforcement proceedings upon the request of the party on whose behalf the subpoena was issued. There is no abdication by the Board of its responsibility to determine the facts of a case if it does not institute enforcement proceedings sua sponte, and we perceive no basis for applying a different rule to the decision to institute post-enforcement contempt proceedings.

Lacking evidence that the employer requested the Regional Director to institute contempt proceedings against its absent, employee-witness Shah, the majority thus joined the hearing officer in finding no merit in the employer's contention that the Region erred in failing to institute proceedings sua sponte. The majority also excluded the subpoenaing party itself from the obligation to institute contempt proceedings in court, holding that the employer's only procedural duty was to make such a request to the Regional Director. The Board, accordingly, did not adopt the hearing officer's finding that the employer had the burden of instituting contempt proceedings against Shah and the Board opposed the hearing officer's drawing of an adverse inference against the employer for its failure to institute such proceedings.

Chairman Gould and Member Brame agreed that the Regional Director did not err in failing to institute contempt proceedings based on the employer's failure to request that such proceedings be instituted, to appear at the hearing or to request a continuance, but found it unnecessary to pass on their colleagues' findings concerning circumstances, not present in this case, in which the institution of contempt proceedings may be required.

Dissenting, in part, Member Hurtgen concluded that the Board has the responsibility of seeking compliance with a court order enforcing a subpoena, and that it need not wait for a request from a private party on whose behalf the Board sought the court order. Member Hurtgen, however, agreed with the majority's decision to remand the proceeding to the Regional Director for preparation of a supplemental report concerning the proof of service of the subpoena allegedly served on a second employee-witness, Khan, and for further proceedings deemed appropriate.

EXCELSIOR AND THE PROVISION OF VOTING LISTS

In another early decision, North Macon Health Care Facility, 315 NLRB 359 (October 26, 1994), the Board held that the full names of employees and not merely their initials must be included in the so-called Excelsior[12] list of names and addresses provided within 7 days of the Regional Director's order of election. The Board came to this conclusion because of the need to provide the electorate with a better informed and reasonable choice from both the union and the employer.

Subsequently, during the summer of 1997, the Board addressed the question of compliance with the standards in the mandated provision to unions of names and addresses of employees in Board-ordered elections under Excelsior. In Fountainview Care Center, 323 NLRB No. 172 (June 16, 1997), the Board took note of precedent that evidence of bad faith or gross negligence is not required to find an employer's failure to comply with the Excelsior requirements objectionable, but that the Board had traditionally viewed such conduct as a "relevant

[12] Excelsior Underwear, 156 NLRB 1236 (1966).

consideration" in determining whether there was adherence to the Excelsior voting list requirements.

In Fountainview, the employer was found to have omitted the names of four employees from the eligibility list, and though this constituted a little more than five percent of the eligible voters and was not the result of a good-faith mistake, a majority of the Board, consisting of Members Fox and Higgins, relied upon lack of good faith as a basis for sustaining the union's objections in setting aside the election.

Chairman Gould concurred, stating that a finding of bad faith or gross negligence in the omission of names from the list is not a prerequisite for determining that the employer's conduct was objectionable. He noted that the Excelsior rule was adopted for the " . . express purpose of insuring that all employees be 'exposed to the arguments for, as well as against, union representation.'" In his opinion, Chairman Gould noted that in its Excelsior decision, the Board had recognized that the employer has a "continuing opportunity" to express its views regarding unionization to employees while organizers normally do not have access to plant premises. He also stated that the unions' reliance upon the Excelsior list had taken on "greater significance" by virtue of the Court's holding in Lechmere, 502 U.S. 527 (1992), which established a broad presumption that the nonemployee union organizers do not have access to private property. He said:

> In view of the fundamental importance of the rule to the full and reasoned exercise of employees' Section 7 rights, it is extremely important that the list be complete and accurate. Indeed, it is not uncommon, as in this case, for the election to be close. In such circumstances, a union's lack of complete information as to the identity of each eligible voter could compromise its ability to communicate with a determinative number of voters, and, therefore, affect the outcome of the election.

Where the number of omitted employees was determinative of the outcome of the election, as was the case in Fountainview, Chairman Gould found the "prejudicial effect" on the election was clear. He concluded by noting that litigation about bad faith and negligence would spawn controversies about "a union's actual access to the omitted employees, or the omitted employees' actual knowledge of the campaign issues" which would, in turn, "spawn an administrative monstrosity."

The Board also addressed the issue of inaccurate addresses on the Excelsior list in the context of a close election in Mod Interiors, Inc., 324 NLRB No. 33 (August 7, 1997). Here Member Fox joined with Chairman Gould to conclude that an election should be set aside because of a large number of incorrect addresses and the closeness of the election, notwithstanding the fact that the corrected list was received eight days before the election. The majority stated: "It is extremely important that the information in the Excelsior list be not only timely but complete and accurate so that the union may have access to all eligible voters." Here the Board, rejecting the position of the dissent, explicitly held that Excelsior is not intended to "test employer good faith or 'level the playing field'" but rather to insure that employees are fully informed so that they can exercise their rights under Section 7. As in Chairman Gould's concurring opinion in Fountainview, the Board noted that any case-by-case inquiry into whether the union actually reached employees and the fact that they were fully informed would inevitably produce substantial litigation—a process wasteful to the parties and the taxpayer.

In American Biomed Ambulette, Inc., 325 NLRB No. 171, (June 15, 1998), the Board majority, Chairman Gould and Member Liebman, adopted the hearing officer's recommendation to sustain an election objection based on the employer's failure to substantially comply with the Board's Excelsior requirement. Member Brame found it unnecessary to pass on the Excelsior objection. The Board also unanimously adopted the hearing officer's recommendation to set aside the election based on the employer's failure to post the election notice.

Chairman Gould, in a concurring opinion, noted that the Board requires the Excelsior list to be both complete and accurate so that the union may have access to all eligible employees. He agreed with the hearing officer that the employer did not substantially comply with these requirements where 56 percent of the names on the list were inaccurate and the employer also failed to provide zip codes. Chairman Gould also stated that the hearing officer's conclusion that the employer "acted with bad faith, or at a minimum, gross negligence" is irrelevant to the resolution of an objection to an Excelsior list.

In Thiele Industries, Inc., 325 NLRB No. 211 (July 20, 1998), the Board majority, Members Fox and Liebman, adopted the hearing officer's recommendation to overrule the employer's objections to the election, including an objection based on the employer's failure to include the names of two probationary employees from the Excelsior list. The majority agreed with the hearing officer that the employer is foreclosed from filing an objection based solely on its failure to comply with its Excelsior obligation. The majority, noting that the Excelsior rule's purpose is to ensure "an informed electorate" by "allowing unions the right of access to employ-

ees that management already possesses,"[13] so that employees are able to hear not just the employer's point of view but also the union's arguments in favor of unionization, observed that where, as in this case, a union wins an election notwithstanding the employer's failure to provide it with an accurate Excelsior list, the union has obviously managed to communicate its message to employees despite the employer's omission. The majority thus found it "the height of silliness" for the employer to argue that its employees' vote to be represented by a union should not be allowed to stand because the employees did not have an adequate opportunity to receive from the union information about why they should vote for the union.

Chairman Gould concurred and observed in his separate opinion that the analogous situation is the Board's requirements for the posting of election notices. To further the same statutory goals as the Excelsior rule and to promote clarity and uniformity in the election procedures, the Board's Rules require that employers shall post copies of the Board's official notice of election in conspicuous places for at least 3 full working days prior to the election and that the failure to do so shall be grounds for setting aside the election upon the timely filing of objections. The rule further provides, however, that a "party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting." Accordingly, the Chairman found that same estoppel principle applicable under the Excelsior rule and concluded that a party should not be able to assert its own failure to meet its obligation as a basis for setting aside the election.

Member Brame concurred in the result but disagreed with what he characterized as a "broad rule . . . to the effect that an employer is uniformly and automatically 'foreclosed' or estopped from filing any objections to an election based on its own inadvertent failure to include the names of all eligible voters on the Excelsior list." In Member Brame's view, the effective protection of employees' Section 7 rights requires that the Board investigate all objections based on the inadvertent breach of the Excelsior rule, even when the objection is based on the objecting party's failure to supply a complete voter list and the Board's investigation should be directed to whether eligible voters were prejudiced by the omissions and whether that prejudice could have affected the results of the election. Applying that analysis in the instant case, Member Brame found that the purposes of the Board's Excelsior rule were satisfied in this case.

In another Excelsior case, Bear Truss, Inc., 325 NLRB No. 216 (July 23, 1998), the Board considered the union's election objection alleging that the election should be set aside because the Excelsior list provided by the employer contained 10 inaccurate addresses out of approximately 142 eligible voters where the revised tally showed 67 for, and 69 against, the union. The majority, Members Fox, Liebman, Hurtgen and Brame, agreed with the hearing officer's finding that objection should be overruled and concluded that the employer substantially complied with the Excelsior requirements. Noting that "it is important to the holding of fair elections that employers supply the unions with timely, complete, and accurate information on Excelsior lists," the majority found no evidence that the illegible names and incorrect addresses were due to intentional misconduct or bad faith on the part of the employer.

In dissent, Chairman Gould found the illegible and inaccurate eligibility list faxed by the employer was objectionable where, as here, the election was decided by a close margin and the inaccuracies may have compromised the Petitioner's ability to communicate with a determinative number of voters, and deprived those employees of the ability to cast a free and reasoned vote.

In Excelsior cases, the issue relates to the provision of names and addresses *subsequent* to the ordering of an election by the Regional Director. A related issue was present in Technology Service Solutions, 324 NLRB No. 49 (August 22, 1997), where the General Counsel's complaint alleged that Section 8(a)(1) of the Act was violated through the refusal to provide names and addresses of bargaining unit employees *prior* to the ordering of an election where there were no reasonable alternative means for the union to communicate with the employees.

In this case, the employer installed, serviced and repaired computer systems nationwide. The employees who performed this service, customer service representatives (CSR), performed their duties in specific geographical areas within their territories. They were geographically dispersed and did not report to any central location, rather they worked out of their own homes or vehicles and worked at customers' locations.

This case was complicated in that the Board required a region-wide bargaining unit. Accordingly, the union which had sought a more narrow unit, never received the Excelsior list that would have been provided had the election gone forward because the union did not have an adequate showing of interest in the region-wide unit. The union, investigating possible television, radio stations, and newspapers in the major media market, concluded that a mass media campaign to reach the CSRs in the region would be "astronomically expensive" and probably "ineffective" and thus did not attempt to mount a campaign in this way. The Board majority of Members Fox and Higgins found, contrary to the Administrative Law Judge, that the General Counsel presented

[13] NLRB v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969).

sufficient evidence to overcome the respondent's motion to dismiss and that, upon remand, the respondent should be given an opportunity to introduce evidence on the issue of access to names and addresses in its defense.

In his concurring opinion, Chairman Gould noted that the right of union officials to discuss organization with employees within the unit ". . . exists only in theory" and that the union had no way to identify or contact CSRs on its own. He stated that where employees' efforts to obtain representation are ". . . severely hampered because, due to the Respondent's unusual operating structure, unit employees are so dispersed and little known to each other that they are effectively deprived of both their right to discuss organization among themselves and their right to learn the advantages of self-organization from union representatives" a *prima facie* case had been established by virtue of the denial of the union's request for unit employees' names and addresses. He also stated that precedent supported the concept that as ". . . the right of employees to discuss organization among themselves is diminished, they have a heightened claim on learning the advantages of self-organization from union representatives." And finally Chairman Gould noted that Lechmere, in supporting access for union organizers for entry onto company property where there are isolated facilities, as well as cases in support of the right to names and addresses of employees when they are closed off from normal contact, supported the idea that access to *names and addresses*—less intrusive than access to property—was appropriate in this situation.

POSTAL BALLOTS

In Shepard Convention Services, Inc., 314 NLRB 689 (August 3, 1994), enf. denied 85 F.3d 671, 152 LRRM 2471 (D.C. Cir. 1996), the Board held that a mail ballot should be provided where it was unlikely that on-call employees would be able to exercise the franchise at the plant facility because of the irregular nature of their work and the fact that they have other employment. The Board held that the Regional Director's failure to provide for a postal ballot was an abuse of discretion.

Again, in early 1994, the Board granted review of a Regional Director's decision which held that postal ballots could not be provided where strikers did not cross the picket line and, indeed, were working out of state—the Regional Director's decision was based upon the NLRB's Casehandling Manual which does not provide for postal ballots under these circumstances. Lone Star Northwest, Case 36–RD–1434, review granted April 17, 1994.[14] Contrary to the Court of Appeals decision in Shepard[15] the Casehandling Manual is not binding upon the Board—and it states that it does not constitute a decision of the Board or Board policy. On the other hand, in Willamette Industries, Inc., 322 NLRB 856 (January 10, 1997), the Board did not order a mail ballot because "The sole factor cited in favor of a mail ballot, that the employer's facility is approximately 80 miles from the Board's office, alone is insufficient to justify departure from the normal manual election procedure in light of the fact that the unit employees work at a single site." Chairman Gould wrote a concurring opinion noting there was nothing in the record from which one could conclude that the ordering of a postal ballot would constitute an efficient use of Board resources. He stated, however, that: "Presented with the record establishing such a burden, I would conclude that the Acting Regional Director did not abuse his discretion in ordering a postal ballot. But those facts are not presented in this record."

In the summer of 1997, the Board issued two major decisions involving the use of postal ballots in NLRB-conducted elections: London's Farm Dairy Inc., and Reynolds Wheels International. In London's Farm Dairy Inc., 323 NLRB No. 186 (June 20, 1997), the Regional Director decided to conduct the election entirely by mail on the basis that: (1) the voting unit consisted of over-the-road drivers working out of four locations that are great distances apart; (2) employees were scheduled to report to their respective location every other day and thus manual balloting at the employer's facilities would take at least two days; (3) starting and reporting times vary throughout the day and employees would depart for their own routes, resulting in a need for polling hours to cover a substantial period both of the scheduled days; (4) the Grayling location with six employees was a great distance from the regional office and there was no building at that location which could be used for balloting—and voting would require at least two overnight stays by the Board agents; and (5) one of the locations where 10 employees worked was at a distance from the regional office which would require polling hours for most of two days.

The Board majority, Chairman Gould and Member Fox, approved the Regional Director's decision to conduct a mail ballot at the four locations and stated that his decision clearly fell within his discretion. The Board noted that two of the facilities were 199 and 130 miles from the regional office respectively and that there were only a few employees at each facility. The Board also noted that "there are extraordinary variations among the

[14] Subsequently, the Employer filed a motion for reconsideration in which it agreed to stipulate to a mail ballot for the eligible strikers. On that basis, the Board remanded the case to the Regional Director to conduct the election.

[15] 85 F.3d 671 (D.C. Cir. 1996).

shifts and starting times of the drivers" and that there was no building at one of the locations which could be used for balloting at that facility.

Member Higgins, in dissent, argued that secrecy would be undermined by mail ballots and that ". . . an employee should be free to vote in the privacy of the booth, away from the prying eyes of any person." The Board majority noted that instructions which accompany mail ballots specifically state that they are to be marked in secret, emphasize that it is important to maintain that secrecy and direct the employee not to show the ballot to anyone after it is marked, and that ballots are directly mailed to the employee's home address.

Most important, the majority noted that the dissent's theory is a theory in search of facts and evidence given that there is only one reported incident of invasion of privacy in the entire 62-year history of mail ballots under the Act (and that involved an employer and not a union). Moreover, the Board majority noted that during the 63-year period in which the National Mediation Board has been conducting most of its elections by mail—the NMB has conducted all of its ballots by mail for the past decade—there are only two reported instances of improprieties.

Accordingly, the Board was of the view that a mail ballot, like a manual ballot, will promote the solemnity and integrity of the secret ballot process.

Finally, Chairman Gould speaking for himself, noted two considerations which are very important in the mail ballot case. The first is that the Board is in a period of austerity and is constantly called upon by the Congress to limit expenditures because of the need to balance the budget. He explicitly stated that the Board should be concerned about any ballot procedure which places ". . . an unduly burdensome strain on the resources of the Regional Office." And he also noted that the employer's offer to change the work schedule so as to provide for a plant ballot, while not "improper," sends the message that employees' ability to vote predicated upon a different work schedule is something over which they have no control. Under such circumstances, Chairman Gould stated that employee free choice is not well realized.

In Reynolds Wheels International, 323 NLRB No. 187 (June 20, 1997), the Board majority, Chairman Gould and Member Fox, denied review of the Regional Director's direction of a mail ballot election. Although the eligible voters were not scattered geographically, the majority found that the voters were scattered in terms of working staggered shifts that were so varied it would, the parties agreed, have taken 3 consecutive days of manual voting to accommodate all eligible voters.

In dissent, Member Higgins stated that a mail ballot election was a departure from the Board's Casehandling Manual and the Agency's tradition favoring mail ballot elections. He saw no suggestion that a manual ballot was infeasible.

In Sitka Sound Seafoods, Inc., 325 NLRB No. 125 (April 29, 1998), the Board, Chairman Gould and Members Fox and Liebman, denied the employer's request for review of the Regional Director's Supplemental Decision and Certification of Representative. The Board rejected the employer's contention that the Regional Director's decision to send mail ballots to employees on "layoff status" without first obtaining the agreement of the parties fails to comply with Section 11336.1 of the Casehandling Manual. The Board stated that even if these cyclical employees were considered as "laid-off," the Board would find that the Regional Director did not abuse his discretion in directing a mail ballot in light of the fact that may of the employees in question were widely scattered at the time of the election and would otherwise have been unable to vote.

In Cast North America (Trucking) Ltd, 325 NLRB No. 184 (June 30, 1998), Chairman Gould dissented from the Board majority's affirmance of the Regional Director's refusal to conduct an election by mail ballot. The employees in this case, like those in London's Farm Dairy, were long-distance truckdrivers. The employer requested a mail ballot because of concerns that the drivers' duties might preclude them from casting a ballot in a manual election. The union initially agreed that the employer's request was appropriate, but after changing its position and requesting a manual ballot, the Regional Director directed a manual ballot.

The majority, Members Brame and Liebman, acknowledged that although a mail ballot would have been appropriate, the Regional Director did not abuse his discretion in failing to direct one. The majority noted that the "Regional Director apparently agreed with the assessment of the [Union] that two manual voting sessions would give everyone the absolute best chance to vote." The majority also noted that only 2 of 67 eligible voters failed to vote, an insufficient number to affect the election results. Accordingly, the majority overruled the employer's contention that the failure to conduct a mail ballot was objectionable.

In his dissent, the Chairman emphasized that the Board's Casehandling Manual has long recognized the need to conduct a mail ballot in the trucking industry where, as here, "long distances are involved, or where eligible voters are scattered because of their duties." Section 11336. He found that the Regional Director's refusal to conduct a mail ballot constituted an abuse of discretion which warranted setting aside the election. The Chairman found that this error led directly to what he considered an independent basis for setting aside the election—the majority's failure to find that U.S. Department of Transportation (DOT) regulations pertain-

ing to mandatory off-duty periods for long-distance truck drivers precluded two of the employer's drivers from voting. The majority found that the DOT regulations specified only that drivers be off-duty for 8 hours between driving assignments, but did not prescribe what drivers must do with their time during that period. Accordingly, because the majority found that the two drivers were off-duty and in the vicinity of the polls while they were open, the majority also found that the drivers' failure to vote was their own choice and did not warrant setting aside the election.

The Chairman strongly disagreed. He found that the obvious purpose of the DOT regulations was for drivers to obtain 8 hours of rest, i.e., sleep between driving assignments. The Chairman agreed that the two drivers were off-duty and in the vicinity of the polls, but he noted that they were "home sleeping where they should have been pursuant to the employer's 2-hour commuting policy and the mandatory 8-hour rest period set forth in DOT's regulations." Had the two employees arrived early to vote, the Chairman observed, they would have been endangering not only their own safety but also that of the traveling public. Chairman Gould concluded that since the two employees followed the layoff rules applicable to them—rules which comprised a valid part of their overall employment obligations, their failure to vote constituted objectionable election disenfranchisement.

Accordingly, Chairman Gould concluded that their votes, combined with those of two others who were disenfranchised because they were out of town on assignment during the polling period, were determinative and warranted setting aside the election that the union won by only four votes.

In San Diego Gas and Electric, 325 NLRB No. 218 (July 21, 1998), the Board majority, Chairman Gould and Members Fox and Liebman, approved an Acting Regional Director's decision to conduct an election by mail ballot where the 20 unit employees worked at eight different locations spread across more than 80 miles. The majority abandoned the Board's Casehandling Manual "infeasibility" standard, which stated that "the use of mail balloting, at least in situations where any party is not agreeable to the use of mail ballots, should be limited to those circumstances that clearly indicate the infeasibility of a manual election." Noting that the Manual has not been revised since 1989 and does not reflect current Board precedent regarding mail ballots, the majority stated that the direction of a mail ballot election is appropriate: (1) where eligible voters are "scattered" because of their job duties over a wide geographic area; (2) where eligible voters are "scattered" because of their work schedules; and (3) where there is a strike, a lockout, or picketing in progress.

Chairman Gould concurred in a separate opinion, stating that he would find the use of mail ballots appropriate in all situations where the prevailing conditions are such that they are necessary to conserve Agency resources and/or enfranchise employees. Thus, he joined in the decision to abandon the "infeasibility" standard and that a mail ballot would be appropriate in those circumstances cited by Members Fox and Liebman, namely, where eligible voters are scattered because of their job duties over a wide geographic area; where eligible voters' work schedules vary such that they are not present at a common location at common times; and where there is a strike, a lockout, or picketing in progress. Contrary to his colleagues, however, Chairman Gould would not limit the use of mail ballots to those circumstances and would find that budgetary concerns standing alone could justify the direction of a mail ballot election. He noted that in this time of Agency austerity, it is imperative that Regional Directors conserve budget resources wherever and whenever possible in the exercise of their discretion to establish the mechanics of the election process.

Rejecting the dissent's contention that mail ballot elections are somehow inferior to manual ballot elections, Chairman Gould stated that

> A properly conducted mail ballot election is in many if not all instances the equal of a manual ballot for achieving the Board's statutory goal of ensuring employees the opportunity to cast their ballots for or against representation under circumstances free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice.

Responding to the dissent, Chairman Gould noted that employers can and do manipulate the symbolism of a manual election to create the appearance that the employer controls Board procedures; that direct comparisons between manual and mail ballot elections that suggest lower voter participation in the latter are meaningless as mail ballots are generally ordered in situations where voter access is difficult; and that employers retain a significant voice in mail ballot elections since they are free to hold captive audience speeches until 24 hours before the ballots are mailed and are free to lawfully campaign in the workplace during the mail balloting period through methods other than captive audience speeches. Chairman Gould stated that, by decrying the unavailability of the captive audience speech, the dissent appears to exalt this right of communication at the time most propitious to the employer over all avenues of communication protected by the Act, and also suggests that unions have the advantage over employers in com-

municating with employees concerning their views of representation. Neither view, Chairman Gould concluded, "is soundly conceived in terms of the reality of the workplace and the principles of the Act."

In dissent, Members Hurtgen and Brame characterized the majority's decision as a "misdirection" and stated that "this direction is contrary to the finest traditions of the Board, and is fraught with peril. . . . Although the Manual provisions do not have the binding force of law, they nonetheless reflect the Board's historical wisdom in favor of manual elections." Members Hurtgen and Brame noted their belief that manual elections, as compared to mail ballot elections, are far more likely to achieve the statutory goals of providing for the free and fair opportunity for employees to select or reject a collective bargaining representative and that an increased use of mail ballots will diminish the integrity of Board elections, decrease employee participation, and effectively silence the employer's voice in the election campaign. They recommended generally restricting mail ballot elections to those limited situations mentioned in the Casehandling Manual.

In Diamond Walnut Growers, 326 NLRB No. 4 (August 7, 1998), the Chairman again dissented from a Board majority's refusal to find objectionable an Acting Regional Director's failure to conduct a mail ballot. The election in this case was conducted during a strike and was accompanied by conduct that was alleged as objectionable and as an unfair labor practice.

The Chairman and Member Fox found that the respondent's violation of Section 8(a)(3) in assigning work to a returning striker warranted setting aside the election. Member Fox, however, refused to join the Chairman in finding that the failure to hold the election by mail ballot constituted an independent basis for setting aside the election.[16]

The Chairman's dissent on this issue chided the basis underlying the Acting Regional Director's decision not to hold the election by mail. Contrary to the Acting Regional Director's interpretation of the Casehandling Manual, the Chairman found that a mail ballot should not have been foreclosed simply because holding a manual election was not infeasible. The Chairman, citing Reynolds Wheels, London's Farm Dairy, and his concurring opinion in San Diego Gas and Electric, noted that "the Board has never held or construed the Casehandling Manual so narrowly as to require [mail ballots] only in situations where it would be impossible to conduct a manual ballot election." The Chairman was even more critical of the Acting Regional Director's reliance on the Casehandling Manual in concluding that "striking employees are not entitled to special considerations" justifying a mail ballot. The Chairman noted that by virtue of Section 9(c)(3) which grants strikers the right to vote in elections held within 12 months of a strike, special considerations are, indeed, accorded strikers in election situations. By failing to conduct a mail ballot for the strikers to accommodate the practical difficulties they faced (work schedules at their interim jobs, transportation problems, and finances etc.), the Chairman found that the Acting Regional Director frustrated the purpose of Section 9(c)(3).

In Odebrecht Contractors of Florida, Inc., 326 NLRB No. 8 (Aug. 10, 1998), the Board majority, Chairman Gould and Members Fox and Liebman, concluded that the Regional Director did not abuse her discretion in directing a mail ballot election. Noting that they were "troubled" by the Regional Director's failure to articulate her rationale for conducting the election by mail ballot, Members Fox and Liebman concluded that, under the circumstances of this case, the record before the Board was sufficient to decide the issue and that the mail ballot was appropriate. Relying on the guidelines set forth in San Diego Gas, Members Fox and Liebman found that the eligible voters were sufficiently "scattered" over significant distances to warrant an election by mail ballot.

In a separate concurring opinion, Chairman Gould agreed that the record establishes that a mail ballot is appropriate. Citing his concurring opinion in San Diego Gas, Chairman Gould stated that he would find the use of mail ballots appropriate in all situations where the prevailing conditions are such that they are necessary to conserve Agency resources and/or enfranchise employees. Chairman Gould also stated that, in contrast to his colleagues in the majority, he was not troubled by the Regional Director's failure to articulate a basis for her decision to direct a mail ballot election. Noting that it is undisputed that a Regional Director has the discretion to determine the election procedure, whether manual or mail ballot, Chairman Gould stated that, in his view, once the election procedure has been set, the party seeking to alter that procedure has the burden of demonstrating that the Regional Director abused his or her discretion and, in the instant case, the employer failed to meet that burden.

Member Hurtgen dissented, stating that absent an articulated rationale for the Regional Director's decision, he would not uphold it.

JURISDICTION

In Management Training Corp., 317 NLRB 1355 (July 28, 1995), the Board reversed the so-called

[16] Member Hurtgen dissented and found that neither the Section 8(a)(3) violation nor the failure to hold the election by mail warranted setting aside the election.

ResCare doctrine[17] and established a new test for assertion of jurisdiction over employers who operate pursuant to contracts with government entities. Under the ResCare test, the Board, when confronted with a private sector employer contracting with the public sector which is excluded from the National Labor Relations Act, had examined the control over essential terms and conditions of employment retained by both the private sector employer and government to determine whether the private sector employer was "capable of engaging in meaningful collective bargaining."

In Management Training, the Board found that private employers, whether government contractors or not, are within its jurisdiction. (The statute excludes public employers. See infra cases involving exempt political subdivisions.) The Board thus rejected the ResCare approach on the ground that it was inconsistent with the statute and that it was "unworkable and unrealistic." The Board stated that the question of whether there were sufficient matters over which unions and employers could bargain was "better left to the parties at the bargaining table and, ultimately, to the employee voters in each case." It noted that the previous doctrine was an oversimplification "of the bargaining process," because it proceeded upon the assumption that economic terms are the most important aspects of the employment relationship even though other matters are negotiated at the bargaining table. Said the Board:

> In times of downsizing, recession, low profits, or when economic growth is uncertain or doubtful, economic gains at the bargaining table are minimal at best. Here the focus of negotiations may be upon such matters as job security, job classifications, employer flexibility in assignments, employee involvement or participation and the like. Consequently, in those circumstances, it may be that the parties' primary interest is in the noneconomic area. It was shortsighted, therefore, for the Board to declare that bargaining is meaningless unless it includes the entire range of economic issues.

Similarly, the Board noted that a wide variety of issues such as arbitration, no strike clauses, management rights provisions and issues relating to transfers are often contested between the parties and that to treat them as "inconsequential," as the current Board's predecessors had, "demeans the very bargaining process we are entrusted to protect."

Equally important, the Board noted that such an approach was inconsistent with the so-called "freedom of contract" line of authority of the Supreme Court[18] which has obliged the Board not to regulate, directly or indirectly, the substantive terms that are involved in the collective bargaining process. This is a matter for the parties themselves and not the Board.

The Board's Management Training test has been approved by the courts in Teledyne Economic Development v. NLRB, 108 F.3d 56, 154 LRRM 2673 (4th Cir. 1997) enfg. 321 NLRB 58 (1996) and Pikesville United Methodist Hospital v. United Steelworkers, 109 F.3d 1146, 154 LRRM 2929 (6th Cir. 1997) cert. denied, 118 S. Ct. 557 enfg. 318 NLRB 1107 (1995).

In Federal Express Corp., 317 NLRB 1155 (July 17, 1995), a majority of the Board held that where a party alleges that an employer is excluded from the Board's jurisdiction and covered by the Railway Labor Act (RLA), the Board would "continue its practice of referring cases of arguable RLA jurisdiction to the National Mediation Board for an advisory opinion." Chairman Gould dissented and stated that, in his view, the NLRB has the authority and the obligation to determine whether a party is within its jurisdiction, and noted that "there is no other instance in which the Board effectively asks another agency to decide the scope of the Board's own jurisdiction." The Chairman also noted that the Board automatically has deferred to decisions of the NMB and thus abdicated its responsibility to another agency to determine the existence of its own jurisdiction. He said that this approach possessed no logical basis and was inconsistent with the exercise of primary jurisdiction articulated by the Supreme Court in the landmark case of San Diego Building Trades v. Garmon, 359 U.S. 236, 245 (1959). Following referral of the case to the NMB, that agency found the company subject to the RLA.[19] Subsequently, in Federal Express Corp., 323 NLRB No. 157 (May 30, 1997), a majority of the Board, Members Fox and Higgins, deferred to the NMB's decision.

The Board majority stated that the representation petition for employees performing trucking services was within the RLA, resting their decision on the fact that: (1) the services had been operated since their inception under the RLA; (2) the NMB, the NLRB, and the courts had reaffirmed the appropriateness of such coverage in numerous decisions; and (3) more than 85 percent of the employer's domestic shipments are transported by the employer's aircraft, the shipments are "commingled" and every trucking employee "funnels packages into or

[17] ResCare, Inc., 280 NLRB 670 (1986).

[18] NLRB v. American Insurance, 343 U.S. 395 (1952); NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960), and American Ship Building v. NLRB, 380 U.S. 300 (1965).

[19] 23 NMB No. 13 (November 22, 1995).

out of that air operation" and the trucking is linked to a "substantial portion" of the employer's business.

Chairman Gould concurred solely for institutional reasons. He noted that a rider to the Federal Aviation Authorization Act of 1996 expressed the Congressional view that the Board should not assert jurisdiction over Federal Express. He further noted that " . . . Senator Hollings, one of the sponsors of the legislation, repeatedly expressed criticism concerning my decision to dissent from referral of this matter to the National Mediation Board." Chairman Gould stated: "Accordingly, despite the lack of precision in the language of the amendment, I view Senator Hollings' comments and the debate as a whole as expression of Congressional intent that, with regard to the instant petition, Federal Express Corporation remains under the jurisdiction of the National Mediation Board." Chairman Gould further stated that his opinion is consistent with his overriding concern that the Board adhere strictly to Congressional intent—as distinguished from Congressional pressure—as best as the Board can ascertain it.

In United Parcel Service, Inc., 318 NLRB 778 (August 25, 1995), enfd. 92 F.3d 1221, 153 LRRM 2001 (D.C. Cir. 1996), the Board came to the exact opposite conclusion, grounding its decision to retain jurisdiction on the fact that it historically had exercised jurisdiction over the employer. As the employer in this case noted subsequent to the Board's decision, it made no sense for the Board to abdicate its responsibility in one situation and then, apparently on some basis of a labor law doctrine of hot pursuit, exercise jurisdiction in the other. Chairman Gould concurred in the assertion of jurisdiction over United Parcel Service. He reiterated his view that the Board shall eliminate its practice of referral and deferral of RLA jurisdictional claims.

The Board again addressed the issue of RLA jurisdiction in Service Master Aviation Services, 325 NLRB No. 151 (May 15, 1998), in which a majority of the Board, Members Liebman and Brame, deferred to a NMB decision finding that the employees at issue, skycaps employed at National Airport in Washington, D.C., were covered by the RLA. Deferring to the NMB's decision, the Board majority then held that it lacked jurisdiction under Section 2(2) of the NLRA and dismissed the union's representation petition. Chairman Gould dissented, stating that in his view, the Board has the authority, the expertise and the responsibility to decide matters of its own jurisdiction in cases initiated before it. He stated that application of the RLA should initially be based on whether the work performed by the employees bears a substantial connection, i.e., more than a tenuous, negligible, and remote relationship, to the transportation activities covered by the RLA, regardless of whether the employer is a carrier or noncarrier under that Act.

The Chairman rejected his colleagues' criticism that he had not applied the "proper" NMB jurisdictional test, stating that "My interest, however, is in properly determining the jurisdiction of the National Labor Relations Board." On this basis, the Chairman would have found that the petitioned-for employees were involved in work that would normally be covered by the NLRA, and that their jobs were at most an incidental service to the air carrier. Accordingly, the Chairman would have asserted jurisdiction over the employees.

The Board addressed the issue of jurisdiction over the horseracing industry in Delaware Park, 325 NLRB No. 12 (November 8, 1997). In that case, the Board unanimously asserted jurisdiction over a slot machine enterprise conducted by a racetrack. Pursuant to Section 103.3 of the Board's Rules and Regulations, the employer argued that the Board should decline jurisdiction because of the employer's involvement in the horseracing industry. Members Fox and Higgins found that the facts in Delaware Park paralleled those in Prairie Meadows Racetrack & Casino, 324 NLRB No. 91 (September 30, 1997), in which the Board asserted jurisdiction over a racetrack that received substantial income from slot machines. In both cases, Members Fox and Higgins concluded that the casino operation did not involve the horseracing industry since the job functions of the employees in the units sought related predominantly to the casino operation and there was no significant functional integration between the casino and horseracing operations.

In both cases, Chairman Gould concurred in the result. In Prairie Meadows, he simply stated that there is "no basis for the Board's stance on declining jurisdiction over the horse and dog racing industries." In his concurring opinion in Delaware Park, Chairman Gould stated that the horseracing industry is an industry with a major impact on commerce and, until Section 103.3 is revoked, the many employees working in this industry will continue to be denied the protections of the National Labor Relations Act.

He observed that the Board's stated reasons for adopting Section 103.3 in 1973, namely that the states exercise extensive regulatory control over the horseracing industry and the sporadic nature of employment within the industry encourages temporary part-time workers, high turnover and an unstable workforce, made no sense then and provide even less support for the rule almost a quarter century later.

First, Chairman Gould noted that, since state regulation of casinos, jai alai facilities, and other types of gaming establishments has not foreclosed the Board's jurisdiction over those entities, neither should similar state regulation of the horseracing industry. Second, he noted the substantial evidence that today employment at

many, if not most, racetracks is not "sporadic or unstable." Citing examples of racetracks which schedule racing throughout the year with only brief breaks, he observed that it seems quite likely that these employers are hiring a large proportion of their workforce on a year-round basis. Further, he pointed out that the Board has not encountered serious administrative problems when dealing with other industries where employees have chosen various kinds of flexible working arrangements and schedules. Finally, in view of the fact that many tracks are owned and operated by multinational corporations, Chairman Gould stated that the horseracing industry is no longer, if it ever was, a local business and that a labor dispute in this industry will have a substantial impact on commerce.

Two other jurisdiction cases involved the Board's political subdivision test as set forth in NLRB v. National Gas Utility District of Hawkins County.[20] In Oklahoma Zoological Trust, 325 NLRB No. 17 (November 8, 1997), the Board majority affirmed the Regional Director's dismissal of a representation petition on the grounds that the employer, the Oklahoma Zoological Trust, is a political subdivision exempt from the Board's jurisdiction under Section 2(2) of the Act. The majority agreed with the Regional Director that the Trust satisfied the second prong of the Board's test for determining whether entities are exempt political subdivisions under Hawkins (exempt political subdivisions are entities that are either (1) created directly by the State, so as to constitute departments or administrative arms of the Government; or (2) administered by individuals who are responsible to public officials or to the general electorate) since all of the trustees are either public officials or selected by public officials and can be removed by a district court. The majority also noted that the Trust's operations are funded from public funds, its meetings and records are open to the public, and the Trust has the power of eminent domain.

Chairman Gould dissented, stating that the appointment and removal procedures do not create the "direct personal accountability" required to establish an exempt political subdivision under Hawkins. He noted that the composition of the board of trustees and appointment procedure is established by the trust agreement not by statute and that six of the nine trustees are appointed by the mayor from a list of names submitted by the Oklahoma Zoological Society, a privately held nonprofit charitable corporation. Thus, the Chairman found that the mayor exercises at best a limited veto power by choosing one name at the exclusion of the other names on the list and that those on the list are more accountable to the Society for placing their names on the list than to the mayor for appointing them from the list.

Further, in Chairman Gould's view, a critical factor in establishing accountability under Hawkins is whether public officials or the general electorate have an unfettered right of removal during an individual's term. He stated that

> [a]s the courts have recognized, the power of removal is as important as the power of appointment to the determination of accountability to public officials or the general electorate. Once appointed, an individual remains accountable to the political official or the public only because of the authority to remove that individual during his or her term. In the case of a true political appointee, the basis for removal can lie totally within the discretion of the appointing official or entity. Thus, if an entity is to be found to be an exempt political subdivision, then those individuals who manage it must continue during their term to be responsible to those who put them in office.

In the instant case, Chairman Gould found that the removal of the trustees is not at the will of the mayor or other city official but must be based on some incompetency or wrongdoing established in a judicial proceeding and there is no evidence that the removal procedure set forth in the trust agreement is the same procedure applicable to public officials. He further found that other factors relied on by the majority do not support a finding of an exempt political subdivision in the absence of accountability to political officials through appointment and removal procedures.

In Enrichment Services, Inc., 325 NLRB No. 154 (May 20, 1998), the Board unanimously agreed to assert jurisdiction over an organization that provides Head Start services in Georgia, finding that the employer was not exempt from the Board's jurisdiction as a political subdivision. There was less unanimity, however, in the Board's rationale.

The employer was a private, not-for-profit corporation funded pursuant to the Community Services Block Grant (CSBG) Act, which required that the recipient organizations be governed by a tripartite board of directors, with one-third of the directors being elected or appointed public officials or their representatives, one-third being officials or members of business, industry, labor, religious, welfare education or other major groups and interests in the community, and the final one-third being "persons chosen in accordance with democratic selection procedures adequate to assure that they are representative of the poor in the area served." The issue here was whether the directors in this final one-third

[20] 402 U.S. 600 (1971).

meet the Board's political subdivision test as set forth in Hawkins.

In a plurality opinion, Members Liebman and Brame found that an entity is not exempt from the Board's jurisdiction as a political subdivision under Hawkins, unless the electorate which elects the organization's administrators reflects all individuals in the area served who are eligible to vote in general elections. They found that this requirement was not met where, as here, the electorate comprises only a limited group of voters, such as "the poor." In so finding, Members Liebman and Brame also overruled Woodbury County Community Action Agency, 299 NLRB 554 (1990), and Economic Security Corp., 299 NLRB 562 (1990), in which the Board held that similar entities administering anti-poverty programs pursuant to the CSBG Act were exempt political subdivisions, based on those entities being governed by tripartite boards of directors like the one here.

The plurality distinguished two other cases, however, Salt River Project, 231 NLRB 11 (1977), and Electrical District Number Two, 224 NLRB 904 (1976), in which the Board found that it did not have jurisdiction over special purpose districts created under state law to provide electricity to landowners in designated counties of a state. Despite the fact that the electorate in those cases did not include all persons eligible to vote in a general political election, but was limited to those who owned a specified amount of land, the Board found that other factors in those cases established that the districts were exempt political subdivisions.

Chairman Gould and Member Fox concurred in the plurality's assertion of jurisdiction over the employer, and with the decision to overrule Woodbury County and Economic Security. They stated, however, that they would also overrule Salt River Project and Electrical District Number Two as inconsistent with the Board's holding in the present case. Chairman Gould and Member Fox also noted that although the plurality acknowledges that the entities at issue in those cases were not "responsible to the general electorate" because voting rights were limited to persons owning a specific amount of land within those districts, they rely on other factors as establishing that the entities were nevertheless political subdivisions. Disagreeing with the plurality's analysis, they stated that under the Hawkins test, the Board has expressly limited the exemption for political subdivisions to entities "that meet either the first or the second prong of the test, regardless of what other factors may be present." Thus, Chairman Gould and Member Fox found that consistent application of the Hawkins test requires that Salt River Project and Electrical District Number Two be overruled.

Member Hurtgen also concurred in the assertion of jurisdiction over the employer, but relied on factors other than the composition of the electorate in finding that the employer is not an exempt political subdivision. Member Hurtgen stated that he did not believe that an entity is private simply because its directors are elected by only a segment of the citizenry. Accordingly, unlike his colleagues, he would not have overruled Woodbury County and Economic Security, and he joins the plurality in distinguishing Salt River Project and Electrical District Number Two.

Two recent cases presented the issue of the Board's jurisdiction over religiously affiliated employers under the Supreme Court's decision in NLRB v. The Catholic Bishop of Chicago, 440 U.S. 490 (1979). In finding that the Board could not assert jurisdiction over schools operated by a church that taught both religious and secular subjects, the Catholic Bishop Court focused on the critical and unique role of the teacher in fulfilling the mission of the church-operated school and noted that if the Board were to exercise jurisdiction over parochial schools and its teachers, there is potential for government entanglement with the religious mission of the school.

In Ecclesiastical Maintenance Service, Inc., 325 NLRB No. 98 (April 10, 1998), the Board, consisting of Chairman Gould and Members Fox and Brame, asserted jurisdiction over the employer, a nonprofit corporation formed by the Roman Catholic Archdiocese of New York engaged in the business of providing cleaning and maintenance services on a contract fee basis for facilities including churches, schools, and seminaries in the Archdiocese of New York.

In asserting jurisdiction, the Regional Director distinguished Riverside Church in the City of New York, 309 NLRB 806 (1992), in which the union sought a unit of service and maintenance employees employed by the church and the Board declined to assert jurisdiction, finding that the petitioned-for employees did not spend a substantial part of their work time in activities related to the commercial portions, as opposed to the religious aspects, of the church's operations. The Regional Director found that, in this case, the employer is not itself a religious institution and it does not provide worship services or religious education. Rather, the Regional Director found that the employer's purpose is to provide routine commercial cleaning and maintenance services to various facilities within the Archdiocese of New York.

Chairman Gould and Member Fox stated that they did not agree that the distinction made by the Regional Director between the facts of Riverside Church and the facts of this case is of legal significance under Catholic

Bishop. Accordingly, Chairman Gould and Member Fox stated that they would overrule Riverside Church.

In Casa Italiana Language School, 326 NLRB No. 14 (August 11, 1998), the Board, consisting of Chairman Gould and Members Fox and Liebman, reversed the Regional Director and asserted jurisdiction over the School which is located within the Casa Italiana Social and Cultural Center adjacent to the Holy Rosary Roman Catholic Church in Washington, D.C. The Board found that the School's mission is to teach Italian and that there is no evidence that the School proselytizes, or inculcates by instruction, any religious doctrine or belief. Thus, the Board stated the sensitive First Amendment issues surrounding the dispute over Board jurisdiction in Catholic Bishop are not present in the assertion of jurisdiction over the teachers employed by the School. Chairman Gould and Member Fox indicated that they agree that Riverside Church is distinguishable from this case, but noted that they would overrule it.

UNION ACCESS CASES

The Board, in series of 3–2 decisions, has followed the Supreme Court's 1992 decision in Lechmere v. NLRB.[21] The Supreme Court's Lechmere decision requires the Board not to make an employer's exclusion of nonemployee organizers where the union is trying to reach the public an unfair labor practice. (In Lechmere they were trying to reach the employees.) See Makro Inc. and Renaissance Properties Co., d/b/a Loehmann's Plaza, 316 NLRB 109 (January 25, 1995), rev. denied sub. nom. UFCW Local No. 880 v. NLRB, 74 F.3d 2992, 151 LRRM 2889 (DC Cir. 1996), cert. denied 117 S. Ct. 52 (1996); Leslie Homes Inc., 316 NLRB 123 (January 25, 1995), rev. denied sub. nom. Metropolitan Dist. Council United Brotherhood of Carpenters & Joiners v. NLRB, 68 F.3d 71, 150 LRRM 2641 (3rd Cir. 1995). Chairman Gould's concurring opinion stressed his disagreement with Lechmere and his obligation to adhere to it as the law of the land and to follow its implications nonetheless.

In a series of decisions, however, the Board adhered to Lechmere's retention of the doctrine that discrimination in terms of providing access between different groups serves as a basis for invalidating the employer rule. See, for instance, Riesbeck Food Markets, Inc., 315 NLRB 940 (December 16, 1994); petition for review granted and cross-petitions for enforcement denied, unpublished memorandum decision, 91 F.3d 132 (4th Cir. 1996); Dow Jones and Company, Inc., 318 NLRB 574 (August 25, 1995). See also Cleveland Real Estate Partners, 316 NLRB 158 (Jan. 27, 1995), enf. denied 95 F.3d 457, 153 LRRM 2338 (6th Cir. 1996), where a Board panel of Members Stephens, Browning and Cohen found that the employer, a privately owned shopping center, violated 8(a)(1) by preventing nonemployee union handbillers from distributing handbills on its property urging customers not to shop at nonunion stores, because the employer knew and permitted other political and charitable groups to solicit and distribute on its property.

In Four B Corp. d/b/a Price Chopper, 325 NLRB No. 20 (November 8, 1997), a majority of the Board, consisting of Chairman Gould and Member Fox, held that an employer violated Section 8(a)(1) of the Act by refusing to allow nonemployee union organizers to contact employees on the employer's property when it had allowed numerous other nonemployee organizations to solicit on the property, even if the nonunion organizations had solicited the employer's customers and not its employees.

The Administrative Law Judge found that, even though the employer had allowed other outside organizations to solicit on company property, those groups had solicited the employer's customers, not its employees. He therefore found no disparity in treatment of the organizers and recommended that the complaint be dismissed.

The Board majority found, contrary to the judge, that the record did not establish that the nonunion outside organizations had solicited only the employer's customers. In fact, the majority found that most of those solicitations were of the type directed to all passers-by, and took place at the store entrances, where employees normally would be expected to enter and leave the stores. Thus, the majority found that the employer had allowed nonunion groups to contact its off-duty employees outside the stores, and that it violated Section 8(a)(1) by denying the union organizers the same privilege.[22]

But even if the nonunion solicitations had been directed solely at customers, the majority found, the employer still had unlawfully discriminated against the union organizers by denying them access to off-duty employees in the parking lots and on the sidewalks. In those circumstances, the majority found no material distinction between off-duty employees and customers. Accordingly, by allowing nonunion organizations to contact customers on its property, but prohibiting union organizers from contacting employees, the employer had effectively discriminated against union solicitation on the basis of its content, in violation of Section 8(a)(1). In arriving at that conclusion, the majority found no significance in the fact that the employer had previously refused to allow nonunion organizations to contact on-duty employees in work areas, because such contacts would have violated the employer's written no-

[21] 502 U.S. 527 (1992).

[22] See NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

solicitation/no-distribution policy. By contrast, the union's attempted solicitation of off-duty employees outside the stores would not have violated the written policy, and the employer did not contend that it had ever prevented nonunion organizations from soliciting employees in those circumstances.

In dissent, Member Higgins found that the General Counsel had failed to demonstrate that the employer had, in fact, allowed nonunion organizations to solicit its employees. He therefore agreed with the judge that the evidence established only that the employer had allowed those organizations to solicit its customers. As there was no evidence that unions had been forbidden to solicit customers, Member Higgins found that the General Counsel had failed to show any discrimination along Section 7 lines, and he would have dismissed the complaint.

EMPLOYEE AND EMPLOYER SPEECH

In Caterpillar, Inc., 321 NLRB 1178 (August 27, 1996), a majority of the Board held, in affirming the Administrative Law Judge, that the employer violated Section 8(a)(1) by prohibiting its employees from displaying various union slogans including a statement, "Permanently Replace Fites," and violated Section 8(a)(3) by enforcing the rule. The Board stated that it agreed with the Administrative Law Judge that the slogan was a response to the employer's stated policy of using permanent replacements rather than an attempt to cause the removal of Fites as the chief executive officer. But, even if they were attempting to remove the chief executive officer, the Board's view was that the conduct was protected.

Chairman Gould concurred in a separate opinion expressing his dissatisfaction with Board and court precedent with respect to employee activity which seeks to influence management policy and its protected status. He said:

> [T]he level of managerial policy or hierarchy protested by the union or employees should have little if anything to do with whether such employee activity is protected. Quite obviously, the level at which managerial representatives are involved in employment conditions will vary from company to company. While I am of the view that concerted activity for the purpose of influencing management policy, which is unrelated to employment conditions, is not protected under the Act, the fact of the matter is that the presence or absence of a particular corporate hierarchical structure or internal organization does not provide the appropriate answer to the question of whether employee activity is protected under Section 7 of the Act.

In Eldorado Tool, 325 NLRB No. 16 (Nov. 9, 1997), a case arising out of the employer's response to an organizing campaign by the UAW, the Board majority of Member Fox and Higgins found that the employer violated Section 8(a)(1) of the Act by its "UAW WALL OF SHAME" display naming plants with UAW-represented employees that had closed.

The display consisted of a banner reading "PLANT CLOSURES: UAW WALL OF SHAME" and a number of paper tombstones each with "RIP" and the name of the UAW-represented plant that had closed. Every day, the employer added another tombstone with the name of another closed plant. On the day before the election, the respondent posted a tombstone with the name "Eldorado" and a question mark.

The majority found that, in the context of other unfair labor practices committed by the employer, the logical inference to be drawn from the display was that the same fate of plant closure and job loss awaited the Eldorado employees if they voted for the UAW. The majority also noted that the employer offered no explanation of the basis for its assertion that the UAW was to blame for the closing of the other plants and that, without the necessary objective basis, such statements are not protected by Section 8(c) of the Act.

Chairman Gould, in a separate opinion, found that the Wall of Shame display was permissible under Section 8(c). In his view,

> [t]o be sure, it is a violation of the Act for an employer to threaten, either directly or indirectly, to close its facility if its employees select a union as their collective-bargaining representative. It is not unlawful, however, for an employer to make reference to what the employer perceives to be a union's record at other plants. Such references are a fact of industrial life, frequently part of the rough and tumble of electioneering, and the Board cannot and should not be responsible for policing the objective considerations relied on by an employer. If the employer's statements are not complete or are inaccurate, it is for the union to respond.

The Chairman noted that, in attempting to balance an employer's constitutional right to express noncoercive opinions under Section 8(c) and the rights of employees to associate freely as embodied in Section 7 and protected by Section 8(a)(1), the Supreme Court in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), stated that an employer is free to communicate his general views about unionization or his specific views about a particular union as long as that communication is neither a threat of reprisal nor a promise of benefits. Chairman Gould found that the display was a permissible reference by the employer to its opponent's record at other facilities in

the area and did not constitute either direct or indirect threats of job loss or plant closure.

Noting that there is nothing in the display that suggests the employer will retaliate against employees for union activities, Chairman Gould stated that, if the employer's statements are not complete or accurate, it is not the Board's role to compel the employer to become an apologist for the union or any party. In his view, the proper response to any speech, accurate or inaccurate, is more speech not less speech and the Board should be concerned only with a union's potential inability to respond to an employer's statements about its record. Chairman Gould stated that Board should not seek to regulate either the employer or the union's speech absent coercion but should instead seek the full utilization of existing methods of communication so that both sides can have full and wide-open discussion of the arguments for, as well as against unionization. In particular, Chairman Gould noted that the Board must protect a union's ability to present its views by those means of communication that remain available to it within the confines of the Court's decision in Lechmere, where the Court established the broad presumption that nonemployee union organizers do not have access to private property.

ENFORCEMENT OF NO-DISTRIBUTION RULES

In Beverly Enterprises-Hawaii, Inc. d/b/a Hale Nani Rehabilitation and Nursing Center, 326 NLRB No. 37 (August 26, 1998), a Board majority, Members Fox, Liebman, Hurtgen and Brame, held in separate opinions that an employer did not engage objectionable conduct by having its supervisors distribute anti-union literature to employees in areas where employees were prohibited from distributing literature. Chairman Gould dissented, finding that the employer's conduct constituted disparate enforcement of its no-distribution rule.

In finding the employer's conduct not objectionable, the majority relied on the Supreme Court's decision in NLRB v. United Steelworkers of America (Nutone, Inc.), 357 U.S. 357 (1957). Members Fox and Liebman found the conduct not objectionable because no attempt had been made to show that the employer's conduct significantly diminished the ability of the union to get its message to employees. They added, however, that there could be other circumstances where there exists such an imbalance in opportunities for communication about unionization that enforcement of the rule is either objectionable or unlawful. Member Hurtgen found that the conduct was not objectionable because under Nutone, an employer's rule against employee distribution is not rendered unlawful simply because the employer chooses to use its own premises to engage in its own distribution. He stated that his view was based on principles of private property and free speech. He added that there has been no showing of a lack of reasonable opportunities for communication, and there is no necessity for proscribing the employer from using its own property to express its own views about unionization.

In a lengthy concurrence, Member Brame opined that Chairman Gould and Members Fox and Liebman have cast doubt upon decades of settled Board and court precedent that give employers the right to make and enforce rules prohibiting employee distribution of literature on working time and in working areas. Member Brame views Nutone as giving employers the right to engage in noncoercive distribution activities and maintain at the same time a valid rule prohibiting employees from engaging in similar distribution activities. According to Member Brame, employees may be entitled to greater distribution rights under Nutone only when two conditions are satisfied: a request has been made for an exception to the employer's rules, and there is a showing that employees cannot be reached through traditional channels of communications. Any greater rights, in his view, would require employers to subsidize union campaigns at the cost of presenting their side of the story to their own workers on company time and premises.

In his dissent, Chairman Gould found, contrary to his colleagues, that the employer's conduct amounted to disparate enforcement of its no-distribution rule and that it was open to the Board to find such conduct objectionable. The Chairman noted that the Supreme Court in Nutone clearly indicated that, in proper circumstances, the Board could find an employer's enforcement of a valid no-distribution rule objectionable if it engaged in anti-union distribution of its own. The Chairman argued that the majority's refusal to find such conduct objectionable constitutes an uncritical acceptance of the long discredited maxim that "the king can do no wrong," an idea completely repudiated by the Supreme Court in litigation involving even the highest and most exalted office in this country, i.e., the Presidency. Noting that an employee had credibly testified that employees were not even permitted to talk about the union on company premises, the Chairman found that the circumstances of this case warrant a finding that the enforcement of the no-distribution rule was objectionable. Unlike the circumstances in Nutone, it was clear from the record that any request by employees to distribute literature would have been futile. In addition, the Chairman disagreed with his colleagues that a failure to show that the union could not reach employees through alternative channels precluded a finding that the employer's conduct was objectionable. By relying on the absence of such a showing, the majority ignored the Court's directive in Nutone that no such mechanical answers will avail for the solution of this issue. Finally,

the Chairman urged the reversal of Board cases holding that it is not unlawful for an employer to distribute literature to employees in the face of a no-distribution rule, because the basis of those holdings is Nutone, which clearly gives the Board the discretion to find such conduct unlawful.

RECOGNITION DISPUTES

In Caterair International, 322 NLRB 64 (August 27, 1996), the Board, subsequent to a remand from the United States Court of Appeals for the District of Columbia,[23] reaffirmed its long-standing policy that an affirmative bargaining order is the standard appropriate remedy for the restoration of the status quo after an employer's unlawful withdrawal of recognition from an incumbent union and a subsequent refusal to bargain. The Board held that such an affirmative bargaining order was necessary in order to protect free choice of representation and to avoid a referendum on collective bargaining in the ". . . immediate wake of . . . [the] employer's unlawful refusal to bargain and subsequent, often protracted, litigation resulting from this misconduct."

In Lee Lumber and Building Material Corp., 322 NLRB 175 (September 6, 1996) affd. in part and remanded in part, 117 F.3d 1454, 155 LRRM 2748 (DC Cir. 1997), the Board held that some unfair labor practices taint evidence of a union's subsequent loss of majority support. Said the Board in Lee Lumber: "[I]n cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support. In cases involving an 8(a)(5) refusal to recognize and bargain with an incumbent union, however, the causal relationship between unlawful conduct and subsequent loss of majority support may be presumed."

In its decision, the D.C. Circuit affirmed the Board's findings that the respondent had unlawfully assisted the employees filing the decertification petition, refused to bargain with the union on the basis of the pending petition, and refused to provide requested information when bargaining did resume.[24] The court also held that the Board acted rationally and consistently with the Act in adopting the rebuttable presumption of taint.

The court found, however, that the Board had applied the presumption in an arbitrary fashion. In sum, the court found a "clear and fundamental inconsistency" between the standard enunciated by the Board and the Board's application of that standard in this case. The court remanded the case to the Board for "correction of this flaw," and noted that the Board on remand might wish to explain more fully its "reasonable time" standard, since, as the court put it, "it is not entirely clear how any of the three factors cut."

THE PROMOTION OF VOLUNTARY RESOLUTION OF DISPUTES AND DIMINUTION OF LITIGATION

In Smith's Food & Drug Centers, Inc., 320 NLRB 844 (February 13, 1996), the Board held that an employer's voluntary recognition of one union, the Intervenor, would bar a subsequent petition filed by a union which was not supported by a 30 percent showing of interest at the time of the recognition. A majority of the Board, Members Browning and Cohen, held that the union may file a valid petition for representation where it has obtained, prior to recognition of the other union, a sufficient number of cards to support the petition, i.e., 30 percent. Chairman Gould concurred with the result, but stated that the Board should refrain whenever possible from involving itself in representation disputes because, "[t]he establishment of a successful collective-bargaining relationship is best accomplished by the parties themselves—the employer, the union, and the unit employees." The Chairman is of the view that clarity, as well as the expeditious resolution of such disputes, is best facilitated by permitting the parties to undertake bargaining without fear of a later challenge by another union. If, of course, the relationship is less than arm's-length and involves unlawful company assistance, the excluded union or disgruntled employees may avail themselves of the Board's unfair labor practice proceedings under Section 8(a)(2). He also expressed the view that the Board was undermining the stability of voluntary recognition and would generate reluctance by employers to do so—especially when the Board facilitates that objective in unfair labor practice litigation where a union files a Section 8(a)(2) charge based upon such voluntary recognition.

In Douglas-Randall, Inc., 320 NLRB 431 (December 22, 1995), a majority of the Board agreed with the theme that Chairman Gould articulated in Smith's Food & Drug Centers and sustained the dismissal of a decertification petition when a settlement agreement subsequently entered into provided a bargaining provision with the incumbent union. Thus, it facilitated the promotion of both settlement and the collective bargaining process—the objective that Chairman Gould sought in Smith's Food & Drug Centers.

In Flint Iceland Arenas, 325 NLRB No. 43 (January 23, 1998), a Board plurality rejected a settlement entered into by the respondent and the union and approved by the Administrative Law Judge, over the objections of the General Counsel. The complaint alleged several violations of Section 8(a)(1), (3), and (5), including threats to

[23] 22 F.3d 1114, cert. denied 115 S. Ct. 575 (1994).

[24] The court, however, declined to enforce the provisions of the Order addressing the refusal to provide information.

the employees by the respondent of physical harm and discharge, unilateral changes in the employees' terms and conditions of employment, interrogation of employees, as well as an assault on an employee. At the beginning of the unfair labor practice hearing, the respondent and the union entered into a non-Board settlement whereby the two employees alleged to have been unlawfully discharged would each receive $7500 and resign their employment, and another employee, who was the subject of much of the alleged unlawful conduct, would also agree to a $7500 payment and resign. In addition, the union agreed to file a disclaimer of interest in representing the respondent's employees.

The plurality opinion, consisting of Members Fox and Liebman, revoked the settlement because in their view, the settlement did not satisfy the first two factors of the Independent Stave[25] analysis, the General Counsel opposed it, and, given the number and seriousness of the unremedied violations, they did not "find that avoiding the risks of litigation is a reasonable trade-off." Member Hurtgen concurred, noting that although he would not require that every unfair labor practice allegation be remedied before a settlement was approved, in the present case he could not accept the settlement because substantial portions of the case were "untouched" by it.

In his dissent, Chairman Gould stated that the Board should be encouraging the voluntary negotiation of settlements in lieu of protracted and frequently wasteful litigation. In his view, the public interest in encouraging the parties' achievement of a mutually agreeable settlement without litigation outweighed the settlement's failure to provide for a notice posting and a remedy for all the alleged violations, particularly where these are only alleged, and not proven. In addition, he noted the union's disclaimer of interest, and stated that the lack of a union presence made this case an unlikely prospect for the use of valuable and scare agency resources. Under these circumstances, the Chairman stated that backpay was an adequate settlement substitute for more comprehensive relief.[26]

Mobil Oil Exploration, 325 NLRB No. 18 (1997), presented the question of whether the Board should defer to an arbitration award pursuant to the standards set forth in Spielberg Mfg. Co., 112 NLRB 1080 (1955), as modified in Olin Corp., 268 NLRB 573 (1984). The award upheld the discharge of an employee for publicly expressing opposition to his union president and seeking support of fellow employees with respect to an ongoing respondent investigation which was expected to, and ultimately did, result in his termination. Members Fox and Higgins found that the conduct for which the employee was terminated constituted protected concerted activity under the Act. Accordingly, because the award upheld the employee's discharge based on his protected concerted activity, they found the award "palpably wrong and repugnant to the Act" and, hence, not appropriate for deferral under Spielberg. They concluded further that the respondent violated Section 8(a)(1).

In a concurring opinion, Chairman Gould added that as a separate basis for not deferring was the arbitrator's failure to consider the pending Section 8(a)(1) charge relating to the discharge. The Chairman noted that in Raytheon Co., 140 NLRB 883 (1963), the Board added to the Spielberg deferral standards and required specific evidence that an arbitrator consider and rule on the pending unfair labor practice. Olin, however, relaxed this standard by applying a presumption, rather than specific evidence, that an arbitrator has considered the unfair labor practice and set forth the requirements for meeting that presumption. The Chairman expressed his disagreement with Olin in this regard and his preference for the more stringent Raytheon standard. Further, in his view Olin was also decided incorrectly to the extent that it "weakened" Spielberg's "clearly repugnant" standard by not requiring an arbitrator's award to be totally consistent with Board precedent. Relying on the Supreme Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), which held that an arbitrator's award construing a bargaining contract's nondiscrimination clause must give full consideration to employee rights under Title VII, the Chairman stated that so too must an arbitrator's award be consistent with Board precedent for deferral to be accorded under Spielberg.

A similar issue arose in McDonnell Douglas Corp., 324 NLRB No. 183 (November 7, 1997), which involved a remand from the Court of Appeals for the District of Columbia Circuit for an explanation of why the Board's underlying decision[27] not to defer to arbitration the consideration of an alleged unilateral removal of employees from a bargaining unit was a lawful departure from the Board's general policy of deferring to agreed-upon grievance and arbitration procedures.[28] In accepting the remand and deferring to the parties' grievance and arbitration procedure, the Board cited the "unique circumstances" of this case, including the court's remand on the deferral issue and the subsequent clarification of Board law with regard to deferral in St. Mary's Medical

[25] 287 NLRB 740 (1987).

[26] Member Brame also dissented, noting that the failure to remedy all of the allegations was not an impediment to approving the settlement, and further noting that with respect to the allegations of harassment, violence or threats of violence, the affected individuals could pursue criminal and civil remedies.

[27] Reported at 312 NLRB 373 (1993). Chairman Gould did not participate in that decision or in the subsequent motion for reconsideration reported at 313 NLRB 868 (1994).

[28] 59 F.3d 230, 236 (1995).

Center[29] which held that the Board will find deferral of a representational issue appropriate when the resolution of that issue turns solely on the proper interpretation of the parties' contract. The Board emphasized that this case represented an exception to, and not the abandonment of, the Board's long-standing general policy against deferral of representation issues which can only be resolved through application of statutory policy.

In a separate footnote, Chairman Gould agreed that deferral was appropriate but noted that, in his view, the presumption favoring deferral is not overcome by the fact that resolution of the 8(a)(5) issue may involve a representation issue in addition to the contractual question. Thus, Chairman Gould stated that, even absent the court's remand, he would find deferral appropriate in this case.[30]

In George Joseph Orchard Siding, Inc., 325 NLRB No. 34 (January 9, 1998), a Board majority, Chairman Gould joined by Members Hurtgen and Brame, denied the General Counsel's request for special permission to appeal the Administrative Law Judge's order directing that the agency supply and pay for an interpreter to interpret testimony given by non-English speaking witnesses called by the respondent during the trial in the underlying unfair labor practice case. In agreement with the judge, the majority opinion found that judges have the discretionary authority under the National Labor Relations Act, the Administrative Procedures Act, and the Board's Rules and Regulations to appoint interpreters in unfair labor practice proceedings.

The majority rejected the General Counsel's contention that the judge had abused his discretion because his order was contrary to long-standing General Counsel policy. The Board found that it was not clear that the General Counsel's policy against paying for an interpreter for a respondent's witnesses had been uniformly applied. Further, the Board majority found that although it was sympathetic to the General Counsel's argument that the judge's order was unwarranted under the particular facts of this case and could establish a harmful precedent, the General Counsel had not set forth sufficient data to determine the extent of the potential financial burden on the agency. Finally, the Board indicated that it was limiting its ruling to the facts of this case, noting that although it was presented with an opportunity to address the broader issue of the appropriate standards to be applied in future cases, it was reluctant to do so without input from the labor-management community. In this regard, the majority indicated that it may be an issue more appropriately addressed through rulemaking.

Members Fox and Liebman dissented, noting the absence of any specific Board precedent or authority for an order requiring the Agency to provide and pay for interpreting services for a respondent's witnesses, and the lack of any clear standards for identifying cases that would warrant such an order.

In Domsey Trading Corporation, 325 NLRB No. 66 (March 10, 1998), a different Board majority upheld a judge's ruling that the respondent must bear the cost of an interpreter for its witnesses in a backpay case where the only issue was interim earnings/mitigation. Members Fox and Liebman, who dissented in George Joseph Orchard, were in the majority, along with Chairman Gould, who concurred. The majority opinion agreed with the judge that the witnesses were properly considered the respondent's witnesses, and that it was the respondent's burden to establish interim earnings and/or failure to mitigate. Further, the majority noted that, as in George Joseph Orchard, there was no claim that the respondent was financially unable to pay for the cost of interpreting services or that such would impose a serious financial burden on the respondent, only that to impose these costs on the respondent would be unfair. The majority concluded by agreeing with the George Joseph Orchard majority that in the future, this issue would be appropriate for rulemaking.

Chairman Gould agreed that the respondent's special appeal should be denied, but did so on the grounds that the judge did not abuse his discretion in requiring the respondent to pay for the costs of interpreting services for its witnesses. The Chairman noted that although the judge here reached a different conclusion than the one reached by the judge in George Joseph Orchard, the exercise of discretion by its very nature can lead to differing results. The mere fact that the results are different, the Chairman concluded, is insufficient to demonstrate that the judge had abused his discretion.

Members Hurtgen and Brame dissented, stating that they would require the Government to pay for the interpreter services that are necessary to the presentation of a respondent's case. They noted that the federal courts impose this requirement in cases where the Government is bringing an action (civil or criminal) against a defendant, and although such is not binding in an administrative proceeding, they find that the rationale applies equally for both situations. They acknowledge the limited financial resources of the Government, but find that absent a showing that the Government cannot pay for the interpretive services, they will require such payment for non-English speaking witnesses necessary to the presentation of the respondent's case.

Several cases involved delay and potential waste of Agency resources on remands. In Alldata Corp., 324 NLRB No. 88 (September 30, 1997), the Board found

[29] 322 NLRB 954 (1997).
[30] 324 NLRB No. 183, slip op. at 4, fn. 10.

that Section 10(b) of the Act did not bar the issuance of a complaint based on a charge filed within the 6-month limitations period—and during the 1995 government shutdown—despite the absence of the jurat or declaration of truth required by Section 102.11 of the Board's Rules and Regulations. The Board majority, Members Fox and Higgins, reversed the Administrative Law Judge's dismissal of the complaint and remanded it to the judge for further proceedings. Chairman Gould dissented from the decision to remand, finding sufficient basis in the record and the judge's decision to resolve the substantive issues raised in the exceptions and stated that he would decide the case without further delay.

In Iron Griddle Restaurant, 325 NLRB No. 221 (July 29, 1998), the Board majority, Members Fox and Hurtgen, remanded to the Administrative Law Judge for reconsideration of his credibility determinations and preparation of a supplemental decision in light of the erroneous basis he asserted for discrediting the testimony of the respondent's majority partner Linda Lewis. The judge found that the respondent violated 8(a)(1) by discharging employee Ferrari for engaging in protected concerted activity and specifically found that Lewis had discharged Ferrari because of Ferrari's request on behalf of herself and another waitress for pay for time spent setting up before the restaurant opened. The judge discredited Lewis' testimony that she discharged Ferrari for insubordination noting that the alleged insubordination was not reported to the Unemployment Compensation Board as a reason for Ferrari's discharge. The majority found merit in the respondent's exceptions that the judge erred in holding that insubordination was not advanced as a reason for the discharge. The majority noted that the unemployment panel's order found, inter alia, "employer's testimony credible that the claimant [Ferrari] was instructed to report to the employer at the end of her shift, and refused to."

Chairman Gould dissented, finding it unnecessary to remand this case. The Chairman found that, even assuming that one of the reasons given by the judge for discrediting Lewis' testimony was erroneous, the judge had sufficient, correct and independent reasons for his credibility resolution. Chairman Gould found that the judge's error in finding that insubordination was not raised at the unemployment compensation hearing did not affect the other reasons offered for the judge in discrediting Lewis, namely his observation of her demeanor and the undisputed facts that insubordination was not given as a reason on any of the forms filled out by Lewis in defense of the unemployment claim or mentioned in a paper offered into evidence by Lewis as containing a list of Ferrari's faults which Lewis claimed she intended to read to Ferrari when discharging her. Accordingly, in these circumstances, Chairman Gould stated that he would not waste the Agency's resources by remanding this case to the judge to reconsider his credibility resolutions.

In Renco Electronics, Inc., 325 NLRB No. 222 (July 28, 1998), the Board majority, Members Fox and Liebman, disagreed with the Regional Director's failure to consider the testimony of three additional witnesses proffered by the employer in its July 18 letter to the Region supporting its objection alleging that the Board's interpreter interfered with the election by threatening employees with fines and imprisonment if they interfered with him. The majority found that the statements of these witnesses were sufficiently related to the issue of Board Agent conduct raised in the employer's original objections to the interpreter's election day activities and remanded the case to the Regional Director for a hearing.

Chairman Gould dissented, stating that he would affirm the Regional Director's report in its entirety including the finding that the additional evidence was untimely. Chairman Gould concluded that this evidence should not be considered in determining the merits of the election objections and stated that he would adopt the Regional Director's decision to overrule the objections.

BARGAINING RELATIONSHIPS

In Goodyear Tire & Rubber Company, 322 NLRB 1007 (January 31, 1997), a majority of the Board, although finding the superseniority clause lawful, adhered to the Dairylea[31] doctrine which declares presumptively unlawful employment status superseniority for union stewards. In a separate concurring opinion, Chairman Gould expressed the view that the rationale of Dairylea should not extend to elected officials. He said, "The prospective steward, . . . is beholden to the employees for their selection, [not the union hierarchy] and thus is encouraged to represent the employees in a manner acceptable to them."

In James Luterbach Construction Co., Inc., 315 NLRB 976 (1994), the Board considered the question of whether the Retail Associates[32] rule applies to the construction industry and Section 8(f) agreements which do not require majority status under the Deklewa decision.[33] Chairman Gould agreed with the majority, which included Members Stephens and Cohen, that Retail Associates applies here, and he agreed with the view that in an 8(f) context an affirmative showing is required to bind an individual employer to a multiemployer successor contract. However, the Chairman parted company with them in their requirement that a "distinct affirma-

[31] 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976).
[32] 120 NLRB 388 (1958).
[33] 282 NLRB 1375 (1987).

tive action" to "recommit" to the union was required. He said that the following test comported with the expectations of the parties:

> To strike a proper balance between an individual employer's Deklewa rights and the promotion of stability of multiemployer bargaining in the construction industry, I would require an affirmative expression from the association to the union at the beginning of negotiations specifying the individual employers on whose behalf it was negotiating. From that point forward, I would find that the union is entitled to rely on the association's representation, and the individual employer is bound by the results of the multiemployer negotiations.

In Oklahoma Installation Co., 325 NLRB No. 140 (May 14, 1998), the Board was presented with the question of whether the respondent, a construction industry employer, voluntarily recognized the union as the Section 9(a) representative of its employees by signing a "Recognition Agreement and Letter of Assent" binding it to an existing collective bargaining agreement between the union and another employer. The letter of assent stated in relevant part that:

> The Union has submitted, and the Employer is satisfied that the Union represents a majority of its employees in a unit that is appropriate for collective bargaining.

The judge found that the foregoing language "would certainly suggest that a 9(a) relationship existed between Respondent and Union." Nevertheless, he concluded that the union did not attain 9(a) status because it never established through authorization cards, an employee poll, or a majority-supported election petition that it, in fact, represented a majority of unit employees.

A panel majority, consisting of Chairman Gould and Member Fox, reversed. They noted that although the Board, under Deklewa, presumes that bargaining relationships in the construction industry are governed by Section 8(f), they noted also that in Deklewa and subsequent cases the Board explained that a 9(a) relationship will be found if a union can show that it unequivocally demanded 9(a) recognition and that an employer unequivocally granted it. The panel majority concluded that the language of the letter of assent constituted "sufficient proof of the union's unequivocal demand for recognition as a 9(a) bargaining representative and the Respondent's voluntary acceptance of the demand." By thereafter repudiating its obligation to recognize and bargain with the union as the 9(a) representative of its employees and refusing to adhere to the terms of the bargaining agreement after its expiration, the respondent was found to have violated Section 8(a)(5).

Contrary to the judge, the panel majority explained that neither Deklewa nor any subsequent case held or suggested that contract language alone, such as the letter of assent, is insufficient to attain 9(a) status. Nor did it matter that the letter of assent did not contain a specific reference to 9(a). The majority stated: "Where, as here, an employer expressly recognizes a union in writing as the majority representative of unit employees, i.e., the very essence of 9(a) status, it is unnecessary that specific reference be made to Section 9(a) itself."

In a dissenting opinion, Member Hurtgen found that the parties' relationship began and remained an 8(f) relationship and accordingly that the "Respondent was free to withdraw recognition at the end of the contract" without violating Section 8(a)(5).

In Canteen Company, 317 NLRB 1052 (June 30, 1995), enfd. 103 F.3d 1355, 154 LRRM 2065 (7th Cir. 1997), Chairman Gould joined Members Browning and Truesdale to form a majority, but fashioned a separate concurring opinion positing that, in a successorship situation, an employer may unilaterally set wage rates that differed from those paid by its predecessor under the collective-bargaining agreement. The majority agreed that the wage rates were imposed unlawfully without first consulting with the union pursuant to the "perfectly clear" exception in NLRB v. Burns Security Services.[34] In his concurring opinion, the Chairman expressed the view that the Board's decision in Spruce Up Corp.[35] established an "[u]nduly restrictive reading of the Supreme Court's definition of circumstances in which a successor employer must bargain about initial terms and conditions of employment."

Spruce Up requires that the perfectly clear obligation to notify and bargain with the union relates only to situations where the employer has misled employees about the wages, hours, or conditions of employment or where the employer has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. In the Chairman's view, Spruce Up grafted an additional requirement not contained in Burns itself. Under Burns, the only requirement is that the new employer plans to retain all the employees in the unit. The Chairman pointed out that the employer's obligation was not to adhere to the predecessor agreement, but rather to simply negotiate about changes. In Canteen he said

> To eliminate instances [from the duty to negotiate] . . . where employers express an intent to provide changed employment conditions from the obligation to negotiate under the "perfectly clear" stan-

[34] 406 U.S. 292, 294–295 (1972).

[35] 209 NLRB 194 (1974), enfd. on other grounds 529 F.2d 516 (4th Cir. 1975).

> dard announced in Burns would both render the holding on this point meaningless and also disregard the careful balance between competing interests articulated by the Court in both Burns and Fall River Dyeing.[36]

Chairman Gould noted that where an employer announced his intent to adhere to the predecessor's agreement—the one situation where the Board seemed to impose an obligation to negotiate—there was little or nothing to bargain about. And finally, the Chairman noted that any kind of disincentive to hire the predecessor's employees—the result that would flow from his position according to his critics—already existed under established federal labor law.

In Lexington Fire Protection Group, Inc., 318 NLRB 347 (August 15, 1995), a 3–2 majority of the Board held that, where past practice supported the procedure employed, an employer could withdraw from a multiemployer association on the basis of a list which had been presented to the union at the commencement of multiemployer negotiations.

The union—as well as the two dissenting members of the Board—took the position that the list was a lengthy one and cumbersome and that therefore the union did not have adequate notice of withdrawal. But they noted that this was the practice historically followed and, in a separate concurrence, Chairman Gould pursued the theme that he had set forth in both Randall and Smith's Food & Drug Centers and said the following:

> The fact that it may not be the most efficient or best in the view of this agency or other third parties is irrelevant. It is the process devised by the parties, which they have bargained for, that supports our decision today and not our own view about what is best for them.

In Chel LaCort, 315 NLRB 1036 (December 16, 1994), the Board reconsidered its Retail Associates rule which precludes withdrawal by an employer from an established multiemployer bargaining unit "[e]xcept upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations."

The United States has never engaged in multiemployer bargaining to an extent comparable to Europe—and the process has declined in this country in recent years. But the Board found no reason to modify the Retail Associates rule and stated that "unusual circumstances" did not apply to situations where the multiemployer association failed, either deliberately or otherwise, to inform its employer-members of the start of the negotiations. The Board held that the imposition of an "unusual circumstances" exception where the multiemployer association failed to notify its members would "[e]ffectively be imposing a notice requirement on the multiemployer association and inserting ourselves into the association/member relationship unnecessarily and with uncertain consequences." This adherence to the parties' own autonomous structures and procedures is, in Chairman Gould's view, consistent with the approach undertaken in Lexington Fire Protection.

ESTABLISHED RELATIONSHIPS AND THE DUTY TO BARGAIN

A unanimous Board, in Consolidated Edison of New York, Inc., 323 NLRB No. 163 (June 10, 1997), addressed the Weingarten[37] right to union representation at an investigatory or fact-finding interview which employees reasonably believe might result in discipline. The Board noted the judge correctly found that supervisors and managers had committed Weingarten violations in each of the four instances alleged in the complaint, but stated that:

> We note, however, that the four violations, each of which involved only one employee, took place over a period of 4 years in a unit that included more than 11,000 employees. Moreover, although the letter of August 29 was written by the head of the department which sets the policy on such matters as Weingarten rights, there is no evidence that it was distributed to anyone other than the union. The evidence shows that the written guidance materials that respondent did distribute to its managers correctly described the Weingarten rule.
>
> Under these circumstances, we are unable to agree with the judge's conclusion that the Respondent "carefully crafted a knowingly unlawful policy" of precluding union representation during investigatory interviews. Because there is insufficient evidence to indicate that the four violations found here were committed pursuant to a company policy or otherwise reflected a pattern or practice of unlawful conduct, we do not find a unit-wide remedy to be warranted. Accordingly, we shall follow the Board's usual practice and confine the injunctive and notice-posting requirements of the Order to the facilities at which the violations were committed. We also find it unnecessary to require the Respondent to mail letters to unit employees explaining their Weingarten rights, indeed, because there is no showing that traditional notice posting would be inadequate to apprise employees of our decision, we shall not require the notices to be mailed. [Footnotes omitted.]

[36] 482 U.S. 27 (1987).

[37] NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

In GTE California Incorporated, 324 NLRB No. 78 (September 23, 1997), a unanimous Board, with Member Fox concurring with a separate rationale, again rejected the union's and General Counsel's position and upheld that of the employer in a duty-to-bargain case. This case involved a union's interest in obtaining relevant and necessary information which it argued was relevant within the meaning of the Supreme Court's Detroit Edison[38] opinion which protects employer confidentiality and requires a balance between the two competing considerations.

The issue presented was the employer's obligation, during the processing of grievances about complaints filed against operators by customers, to provide the names, addresses, and home telephone numbers of any complaining customers but not those with nonpublished unlisted numbers who had not given consent to release that information.

In a majority opinion, Chairman Gould and Member Higgins upheld GTE's confidentiality interest regarding the complaining customer's name, address and telephone number and noted that the California Supreme Court had held that individuals with nonpublished and unlisted service have a reasonable expectation of privacy. The majority noted the employer's accommodation which allowed the union to speak to the complaining customer without release of her identification, and the fact that they had a private conversation after which the union did not request any further contact. Notwithstanding the denial of access to information about the customer identity, the majority rejected the position of the General Counsel and the union.

In Colgate-Palmolive Company, 323 NLRB No. 82 (April 23, 1997), a unanimous Board held that an employer's installation and use of hidden surveillance cameras in the workplace is a mandatory subject of bargaining under the Act and that a union has a statutory right to bargain over the installation and continued use of these surveillance cameras. The conditions of employment, the Board noted, were effected inasmuch as employees caught in theft and/or other misconduct are subject to discipline including discharge as a result of such monitoring. The Board was of the view that since the surveillance cameras were focused upon the restroom and fitness center, privacy concerns of employees were at issue as well.

In Q-1 Motor Express, Inc., 323 NLRB No. 142 (May 23, 1997), the Board addressed a dispute arising out of an employer's decision to relocate a terminal from one city to another.

The Board found that the employer unlawfully failed to provide the union with notice and an opportunity to bargain about a decision to change from a single-driver system to a team-driver system and to transfer bargaining unit work to a new terminal, 80 miles away. The Board agreed with the Administrative Law Judge that the employer unlawfully failed to bargain about both the decision to switch to team driving and the decision to transfer work to its Lafayette, Indiana terminal, but found it unnecessary to apply the Board's Dubuque[39] analysis. The Board concluded that, in the circumstances of the case, the employer's decision to relocate work to Lafayette was not severable from its decision to change from a single-driver to a team-driver system, that each decision was part of a plan that the employer had devised unilaterally, and that the union had a right to receive notice of and an opportunity to bargain over the employer's entire plan.

In his concurring opinion, Chairman Gould noted his disagreement with Dubuque, and expressed the view that there is a duty to bargain about the relocation decision whether it is triggered by labor costs or other costs. He stated that a test which provides only for labor costs as the trigger is a ". . . clear invitation to posturing, game playing, and obfuscation in an attempt to conceal and deceive. The possibility of deception is further aided by the limited amount of information that unions have access to as part of the bargaining process." And, given the fact that the Supreme Court in First National Maintenance[40] stressed the factor of amenability i.e., whether the issue is amenable to resolution through collective bargaining, Chairman Gould alluded to the fruitful experience of GE and IUE whose imaginative approach handles relocation issues through special procedures designed to avoid some of the deficiencies under the NLRA, such as the substitution of specific time periods for impasse. The Chairman stated his hope that acceptance of this approach will move the parties away from what is frequently wasteful litigation which he has tried to diminish in a variety of contexts.

In White Cap, Inc., 325 NLRB No. 220 (July 24, 1998), the Board, in a plurality decision, Member Hurtgen and Chairman Gould concurring separately, found the Administrative Law Judge erred in finding that the employer violated Section 8(a)(5) and (1) of the Act by imposing an unreasonable time limit for union ratification of the respondent's proposed collective-bargaining agreement, and by threatening to withdraw certain contract proposals unless the union met the ratification deadline. The judge in finding the threat to withdraw unlawful had relied upon the proposition contained in

[38] 440 U.S. 301 (1979).

[39] Dubuque Packing Co., 303 NLRB 386 (1991).

[40] 452 U.S. 666 (1981).

Driftwood Convalescent Hospital, 312 NLRB 247, 252 (1993) that a withdrawal from a tentative agreement without good cause is evidence of lack of good faith. While not passing on the issue in the lead opinion, Member Hurtgen stated that in assessing the respondent's overall conduct, he found that the respondent "did indeed have 'good cause' for threatening to withdraw" certain contract proposals unless the union met the respondent's ratification deadline. Member Hurtgen also disagreed with the judge's findings that the respondent violated Section 8(a)(5) and (1) by engaging in regressive bargaining and by withdrawing contract proposals when the parties resumed negotiations, by unilaterally implementing its final proposal in the absence of an impasse, and by thereafter locking out unit employees.

In his separate concurrence, Chairman Gould agreed with Member Hurtgen's conclusion, but disagreed with Member Hurtgen's discussion of the issue of "regressive bargaining." The Chairman rejected outright Driftwood's good-cause requirement and relied solely on the "totality of circumstances" in determining that the employer's willingness to reach agreement indicated an absence of bad faith. Characterizing the good-cause rule as directly contrary to the normal procedure of collective negotiations, the Chairman found that no tentative agreements are binding as to individual issues until a final overall contract is achieved. As to the harshness of the employer's regressive bargaining tactics, the Chairman noted that under the Supreme Court's "freedom of contract" trilogy,[41] "collective bargaining is wide open and rough and tumble where both parties use their resources and economic strength as best they can ."

Member Liebman, concurring in part and dissenting in part, agreed with Member Hurtgen's finding that the employer did not bargain in bad faith, but would also find that the employer unlawfully refused to negotiate with the union about two mandatory subjects of bargaining (the elimination of COLAs and voluntary overtime), and again violated Section 8(a)(1) and (5) when it unilaterally implemented a contract proposal in the absence of a valid impasse.

FAILURE TO NEGOTIATE

In Daily News of Los Angeles, 315 NLRB 1236 (December 30, 1994), enfd. 73 F.3d 406, 151 LRRM 2242 (DC Cir. 1996), cert. denied, 117 S. Ct. 764 (1997), the Board held that a unilateral change resulting in discontinuance of merit raises violated the Act. They held that the employer could not unilaterally withhold a wage increase from employees where it constituted a change in terms of conditions of employment. The remedy, i.e., backpay which would reflect the merit increases that the employees would have been awarded, as well as the violations were affirmed by the Court of Appeals for the District of Columbia.

In McClatchy Newspapers, Inc., 321 NLRB 1386 (August 27, 1996) enfd. 131 F.3d 1026, 157 LRRM 2023 (DC Cir. 1997) cert. denied __ U.S. __ (1998), a Board majority held that an employer could not unilaterally implement merit pay proposals even when bargaining had taken place to the point of impasse. The Board said that if the employer was given carte blanche authority over wage increases without regard to time, standards, criteria it would be ". . . so inherently destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining." The majority went on to say: "[W]e are preserving an employer's right to bargain to impasse over proposals to retain management discretion over merit pay while, at the same time, maintaining the Guild's opportunity to negotiate terms and conditions of employment."

In Ohio Valley Hospital, 324 NLRB No. 6 (July 24, 1997), the Board, Chairman Gould and Members Fox and Higgins, dismissed a complaint alleging that the employer violated Section 8(a)(5) by insisting to impasse over a proposal to give seniority credit to unit employees hired after a layoff from another affiliated hospital. During contract negotiations, the employer told the union that in the future it might consolidate certain services with the affiliated hospital, St. Johns, and, as a result, nurses laid off from one could apply for work at the other. The employer then proposed a seniority provision giving any nurse hired within 60 days of layoff from St. Johns seniority credit for the time the nurse had been continuously employed at St. Johns.

The Board found that the seniority proposal related to terms and conditions of unit employees and was a mandatory subject of bargaining. The Board rejected the contention that the proposal expanded the scope of the bargaining unit by giving present seniority rights to non-unit St. Johns' employees. The Board noted that the proposal did not grant a tangible benefit to St. Johns employees and that the St. Johns employees only receive the benefit in the future if they become unit employees. The Board also rejected the contention that the employer should not be able to insist to impasse on the proposal because the union's acceptance of such a proposal would violate its duty of fair representation. The Board noted that a union's acceptance of a bargaining proposal constitutes a breach of the duty of fair representation only if the proposal is so far outside the wide range of reasonableness that it is irrational or arbitrary and the union offered no evidence of how acceptance of the seniority

[41] The trilogy consists of American National Insurance Company, 343 U.S. 395 (1952); NLRB v. Insurance Agents, 361 US 477 (1960); and American Ship Building v. NLRB, 380 US 300 (1965).

proposal is outside the range of reasonableness. Further, the Board noted that the union is under no obligation to accept the proposal and, if after bargaining, the parties fail to reach agreement, they are entitled to resort to lawful economic action over their disagreement.

Chairman Gould noted that, although the seniority proposal could "cause discomfort to the union and engender a sense of grievance and dissatisfaction amongst the incumbent employees, the union's internal considerations—political or otherwise—are not the Board's concern under extant Federal labor policy in the United States," and the Board does not as a general matter sit in judgment over the parties' contract proposals or the arrived-at agreement itself.

CONCERTED ACTIVITY AND ECONOMIC PRESSURE

In Timekeeping Systems, Inc., 323 NLRB No. 30 (February 27, 1997), the Board held that the sending of an e-mail message about working conditions was concerted activity within the meaning of the Act. A unanimous Board held that an employee does not lose the protection of the statute through his or her attempt to communicate with other employees on such subjects merely because the e-mail was used.

In Target Rock Corporation, 324 NLRB No. 71 (September 18, 1997), the Board, again unanimously, held that replacement employees were not permanent within the meaning of the Mackay[42] rule. They were hired with the following instructions: "You are considered permanent at-will employees unless the National Labor Relations Board considers you otherwise, or a settlement with the union alters your status to temporary replacement." Advertisements for such workers stated that positions could lead to permanent full-time jobs after the strike. Operating within the parameters of Supreme Court precedent on this issue in Belknap, Inc. v. Hale,[43] the Board found that there was little to draw upon which would show permanent status under the circumstances. Notwithstanding the conclusion of the Court that the mere existence of a condition in the employment relationship does not deny permanent status, the Board held that all of the factors indicated that permanent status was not intended by the employer.

In Myth, Inc., d/b/a Pikes Peak Pain Program, 326 NLRB No. 28 (August 20, 1998), the General Counsel issued a complaint alleging that an employee's filing of a wage claim with the Colorado State Department of Labor constituted concerted activity. Before the Administrative Law Judge, the General Counsel urged a return to Alleluia Cushion, Inc.,[44] which held that the individual assertion of a work-related statutory right was presumed concerted unless proven otherwise. The Administrative Law Judge dismissed the complaint, finding that he was bound by the current Board precedent of Meyers Industries, Inc.[45] which rejected the Alleluia theory and held that concerted activity requires an employee's activity to be engaged in with or on the authority of other employees. The judge found that under the Meyers theory of concerted activity, the individual filing of a wage claim was not concerted activity. The Board majority of Members Fox, Liebman, and Brame adopted the judge's decision without comment.

Chairman Gould dissented, finding that the demands of national labor policy vastly favor the Alleluia theory of concerted activity. He asserted that the Alleluia approach places the Board in its proper role of protecting employees who attempt to improve their working conditions. Under Alleluia, employees who individually attempt to secure enforcement of statutes governing the workplace are protected from discharge or discipline for asserting rights that were established for the benefit of all employees. The Chairman found that affording protection to such employees is particularly critical now when so large a percentage of the workforce is unorganized and does not have the protections of a collective-bargaining agreement. The assertion of work-related statutory rights is one of the only means that unorganized employees have to oppose the economic power of their employers. The Chairman stated: "To read Section 7 so narrowly as to exclude individual employees who assert such important collective rights when such a reading is purely a matter of policy, does a great disservice to vast numbers of employees who do not have collective bargaining representatives and who must otherwise depend on the happenstance of whether a retaliatory provision is included in the statute that assert."

Chairman Gould further found that the Meyers narrow reading of Section 7 also creates a gulf between represented and unrepresented employees. Noting that under the Supreme Court's decision in NLRB v. City Disposal,[46] an organized employee's individual assertion of a matter covered by a collective bargaining agreement is deemed protected concerted activity , the Chairman emphasized that the same conduct by an unorganized employee is denied protection under Meyers. The Chairman stated: "In my view, it is neither necessary nor desirable to allow the determination of whether an employee's action is protected by the Act to turn on whether the employee asserts a right covered by a collective bargaining agreement or a right covered by a

[42] Mackey Radio & Television Co. v. NLRB, 304 U.S. 333 (1938).
[43] 463 U.S. 491 (1983).
[44] 221 NLRB 999 (1975).
[45] ("Meyers I"), 268 NLRB 493 (1984), remanded sub nom. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985); Meyers Industries, Inc. ("Meyers II"), 281 NLRB 882 (1986), affd. sub nom. Prill v. NLRB ("Prill II"), 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).
[46] 465 U.S. 822 (1984)

work-related statute. There is a strong parallel between the assertion of these rights. In both cases, the right asserted is not an individual right, but one that is created expressly for employees in the workplace. In both cases, there is reason to believe that the assertion of the right by an individual employee is at heart a concerted act, consented to by other employees."

Chairman Gould further concluded that the simplicity of analysis in Alleluia and more efficient use of Board resources are major policy considerations favoring abandoning Meyers. He stressed that under Alleluia, the initial inquiry is confined to whether an individual employee asserted a work-related statutory right and suffered discipline or discharge in retaliation, whereas the initial inquiry in Meyers is more complex. Under Meyers, it must be determined whether the employee's action was authorized by other employees, general relied upon by another employee, or was engaged in with the object of initiating or preparing for group activity. The Chairman found that such a complex inquiry results in wasteful litigation and places an undue burden on unorganized, unsophisticated employees who " should not be required to engage in such sophisticated or formalistic maneuvers to be shielded from discharge for asserting a right granted by statue to all employees in the workplace."

Member Hurtgen defended the Meyers interpretation of concerted activity in a concurring opinion. He reasoned that Meyers did not create a division between organized and unorganized employees because unorganized employees have the Section 7 right to remain nonunion and to still enjoy their Section 7 right to engage in concerted activity.

In Silver State Disposal Service, Inc., 326 NLRB No. 25 (August 19, 1998), the Board addressed the question of whether a union, by a contractual no-strike clause, waived employees' Section 7 right to engage in a work stoppage in support of a colleague's grievance. The employees, waste haulers and disposal workers, refused to commence work for the first 35-40 minutes of their shift with at least the partial intention of pressuring the respondent to be more generous in its treatment of a discharged colleague. When the employees tried to return to work after an appeal from one of the respondent's supervisors, the respondent's security men turned them away and they were later fired. A Board majority consisting of Members Brame, Fox, and Liebman adopted the Administrative Law Judge's finding that the respondent's termination of the employees violated Section 8(a)(3) and (1) of the Act, but disagreed with the judge's rationale.

The Board majority agreed with the judge that the employees' conduct fell within the statutory definition of a strike, but found no need to reach the judge's finding of employer condonation. Rather, the majority held that the no-strike clause contained in the collective-bargaining agreement between the respondent and the union only pertained to conduct which involved the union: "The Union shall neither call, encourage nor condone any work stoppage, work slowdown, or picketing of the employer's several premises or its trucks." Since the employee strike was a spontaneous reaction met with consternation by the union, the majority concluded that the no-strike clause did not cover the conduct of the employees who participated in the stoppage. In so finding, the majority also held that the implied no-strike obligation recognized in Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962), when the Supreme Court found that a union's contractual commitment to submit disputes to binding grievance arbitration gives rise to an implied obligation on the part of the union not to call a strike over such disputes, is inapplicable where, as here, the parties have agreed on an express no-strike clause. The majority held that given the careful drafting of the collective-bargaining agreement, it is "reasonable to expect" that the parties would have inserted explicit language into the agreement if they had intended it to include concerted employee activities that the union had not sanctioned.

In his concurrence, Chairman Gould reached the judge's finding that the respondent's condonation left the employees' conduct protected under the Act, and wrote separately to address deficiencies in the criteria for protected status. He noted that he did not subscribe to some of the Court's conclusions in Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 60 (1975), which held that consistent with the principles of both exclusivity and majority rule, employees, who sought to bargain with the employer independent of their certified representative and used picketing as a method to accomplish this objective, engaged in unprotected activity under the Act. Chairman Gould noted positively, however, the Emporium Court's concern for the prospect of fragmenting the bargaining unit, a consideration reflected in his own long-standing approval of the interpretation of the Act by the Fourth Circuit Court of Appeals in NLRB v. Draper Corp., 145 F.2d 199 (4th Cir. 1944). In Draper Corp., the court adopted the view that unauthorized stoppages, undertaken once an exclusive bargaining representative has been selected by a majority of the employees, inherently derogate the union and the exclusive bargaining representative concept since the employer is obliged to bargain with the union and not individual employees. Chairman Gould found that Board decisions like Sunbeam Lighting Co., 136 NLRB 1248 (1962), enf. denied 318 F.2d 661 (7th Cir. 1963), and the Fifth Circuit's opinion in NLRB v. R.C. Can Co., 328 F.2d 974 (5th Cir. 1964), have failed to

accurately consider the implications of Draper Corp. for determining protected status and to the extent that they and subsequent decisions are inconsistent with his concurrence, he would overrule them.

In Chairman Gould's view, both Sunbeam Lighting Co. and R.C. Can Co. proceed upon the "naive and misguided" assumption that, if there is any identity or similarity of objectives between the union and individual employees, an unauthorized stoppage is protected under the Act because the majority representation and exclusive bargaining concepts cannot be usurped or derogated under such circumstances. He argued that the major deficiency of this approach is its focus upon the substantive goals being determined by the union and the striking employees to see whether those goals are identical. Chairman Gould advocated discarding the thesis that consensus on the substantive goals of the strike is relevant to the protected status of the workers' conduct, since union and employee goals are synonymous to the extent that both the employees and the union generally want to improve the living standards and protect the job security of the employees. He stated that a more meaningful consideration for determining if the workers' conduct undermines the exclusive bargaining representative concept is whether accord, tested by a vote conducted prior to the strike itself through internal union procedures, exists between the union and the strikers on the questions of strategy and timing. Chairman Gould illustrated the relevance of economic weaponry and timing to preserving exclusivity by noting that, "[if] a union wants to delay use of the strike weapon to a time that it deems to be more propitious, it is hard to imagine something that is more inconsistent with the exclusivity concept than a strike at another time." Chairman Gould found that the Board's present approach promotes the balkanization with which Emporium is at war by protecting a second strike so long as identity of substantive goals is found to exist.

Member Hurtgen, in his dissent, stated that he would not resolve against the respondent the question of whether the parties intended for their no-strike clause to cover non-union mass employee action without giving the respondent an opportunity to present evidence specifically on that issue.

EMPLOYEE PARTICIPATION

In 1995, the Board issued six decisions which address the issue of under what circumstances employee participation committees violate a section of the National Labor Relations Act that prohibits employer-dominated labor organizations. In deciding these cases the Board relied, in part, on its 1992 Electromation decision, which held that an employee participation committee is illegal if it is a "labor organization" under the Act and if the employer dominates or interferes with the formation or administration of the committee, or contributes to it financial or other assistance.

In Keeler Brass Automotive Group, 317 NLRB 1110 (July 14, 1995), the Board found that the Keeler Brass Grievance Committee is a "labor organization" as defined by Section 2(5) of the Act, and that the respondent violated Section 8(a)(2) by dominating the reformation of the committee and interfering with its administration. Chairman Gould, in a concurring opinion, agreed with the view expressed in the Board's decisions in the 1970s that such entities were not labor organizations within the meaning of the Act and that therefore Section 8(a)(2) was not implicated where decisionmaking responsibilities had been delegated to the council, committee or entity in question. The Chairman expressed agreement with the position taken by the U.S. Court of Appeals for the Seventh Circuit in Chicago Rawhide Mfg. Co. v. NLRB[47] that the employee group found lawful there need not originate with the employees but could be proposed by the employer. He said a number of considerations were important. He spoke approvingly of decisions which are

> [C]onsistent with the movement toward cooperation and democracy in the workplace which I have long supported. This movement is a major advance in labor relations because, in its best form, it attempts nothing less than to transform the relationship between employer and employees from one of adversaries locked in unalterable opposition to one of partners with different but mutual interests who can cooperate with one another. Such a transformation is necessary for the achievement of true democracy in the workplace. However, it does pose a potential conflict with the National Labor Relations Act, enacted in 1935 at a time when the adversarial struggle between management and labor was at its height.

The Chairman also said that he thought that the following factors were critical in determining lawful employee-employer programs:

> First, there is the question of how the employee group came into being. The court in Chicago Rawhide stressed that the idea for an employee group began with the employees. Does this mean that any employee group which does not originate with employees is subject to unlawful employer domination? I think not. Much of the initiative for cooperative efforts in the workplace has come from employers, particularly in the nonunion sector. I do not think these efforts are unlawful simply because the employer initiated them.

[47] 221 F.2d 165 (7th Cir. 1995).

> The focus should, instead, be on whether the organization allows for independent employee action and choice. If, for example, the employer did nothing more than tell employees that it wanted their participation, I would find no domination provided employees controlled the structure and function of the committee and their participation was voluntary.
>
> Second, the circumstances surrounding the creation of an employee committee are material to a determination of whether there is unlawful domination of the committee. If the employer created an employee participation organization in response to a union organizing campaign, I would draw the inference that the organization was designed to thwart employee independence and free choice.

The following five decisions issued on December 18, 1995:

In Vons Grocery Company, 320 NLRB 53, the Board, upholding the Administrative Law Judge, found that a California company's quality circle group (QCG) was not a labor organization and did not violate the Act. The Board stated: "For nearly three years, the QCG existed lawfully in the respondent's unionized work force as a group devoted to operational matters. Then, on one and only one occasion, the QCG developed proposals on matters involving conditions of work such as a dress code and an accident point policy." Concluding that this one incident did not "transform a lawful employee participation group into a statutory labor organization" and did not "pose[] the dangers of employer domination of labor organizations that Section 8(a)(2) was designed to prevent," the Board determined that the QCG did not have "a pattern or practice of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

In Webcor Packaging, Inc., 319 NLRB 1203, enfd. in part, 118 F.3d 1115, 155 LRRM 2791 (6th Cir. 1997), cert. denied, 118 S. Ct. 1035 (1998), the Board affirmed the Administrative Law Judge's finding that a Michigan-based company's Plant Council was an illegal labor organization because it existed for the purpose, at least in part, of making proposals regarding proposed changes in working conditions which management would then consider and either accept or reject. The Board further agreed that Webcor unlawfully dominated the formation and administration of the Plant Council because Webcor determined the Council's function, defined the subject matters to be addressed, and chose employee and management representatives to serve on the Council. The Board stated that "the impetus behind the formation of the Plant Council emanated from the Respondent" and that "the Plant Council had no effective existence independent of the Respondent's active involvement and approval."

In Stoody Co., 320 NLRB 18, the Board reversed the Administrative Law Judge and concluded that an employee "Handbook Committee" created and financially supported by the company, a Kentucky manufacturer, did not engage in a pattern of "dealing with" the company on employment conditions. Accordingly, the committee was not a labor organization and the employer did not violate the Act. The Board pointed out: "The Committee had the brief lifespan of 1 hour. Clearly, a 1-hour meeting in itself shows no pattern or practice of any kind. Further, the Board believes, contrary to the judge, that the evidence supports the inference that if additional meetings of the committee had been held, the meetings would not have resulted in proposals to management on working conditions." The Board held further:

> Drawing the line between a lawful employee participation program and a statutory labor organization may not be a simple matter because it may be difficult to separate such issues as operations and efficiency from those concerning the subjects listed in the statutory definition of labor organizations. If parties are burdened with the prospect that any deviation, however temporary, isolated, or unintended, from the discussion of a certain subject, will change a lawful employee participation committee into an unlawfully dominated labor organization, they may reasonably be reluctant to engage in employee participation programs. We support an interpretation of the Act which would not discourage such programs.

In Dillon Stores, 319 NLRB 1245, the Board, agreeing with the Administrative Law Judge, found that the company's Associates' Committees, comprised of hourly employees elected by their co-workers who met quarterly with management to discuss a variety of work-related issues, was a "labor organization under the Act and that the company violated the Act by dominating and interfering with and contributing support to committees at two of its retail stores in Kansas." The Board concurred with the judge who stated that the committees' functions "involved the receipt of proposals and grievances, seemingly on every possible aspect of the employment relationship; and that the communications involved, 'by word or by deed,' acceptance or rejection of those grievances and proposals. This is precisely the bilateral mechanism held to have constituted a labor organization in Electromation."

In Reno Hilton, 319 NLRB 1154, the Board found, as the Administrative Law Judge did, that the Reno Hilton's quality action teams (QATs) were labor organiza-

tions and that the teams made recommendations on numerous work-related matters including safety hazards, staffing levels, work times, paid sick days and the wage structure. The Board acknowledged that although most of the team meetings did not involve wages, hours, or other terms and conditions of employment, "that fact alone does not mean that the QATs are not labor organizations," noting that management developed the QATs, determined their agendas, and paid employees for attending the meetings during worktime. "Although the employees volunteered for membership on the QATs and were not selected by management, it is clear that the Respondent thoroughly dominated and interfered with the formation and administration of the QATs," the Board said.

PERMANENT REPLACEMENTS

In International Paper Co., 319 NLRB 1253 (December 18, 1995) enf. denied, 115 F.3d 1045, 155 LRRM 2641 (DC Cir. 1997), the Board held that an employer cannot permanently replace employees who have been lawfully locked out where the work has been permanently subcontracted to a nonunion firm in order to bring bargaining pressure in support of the employer's bargaining position.

BECK DUES

The Board's decisions in California Saw & Knife, 320 NLRB 224 (December 20, 1995), enfd. sub nom. Assn. of International Machinists v. NLRB, 133 F.3d 1012, 157 LRRM 2287 (7th Cir. 1998), and Paperworkers Local 1033 (Weyerhaeuser Paper Co.), 320 NLRB 349 (December 20, 1995), are the first cases in which it decided questions arising from the Supreme Court's ruling in Communications Workers v. Beck. In Beck, the Supreme Court held that a union was not permitted, "over the objections of dues-paying nonmember employees," to expend funds on activities not related to collective bargaining, contract administration or grievance adjustment. The court concluded that such expenditures violated the union's duty of fair representation.

In California Saw, the Board ruled, among other things, that a union must inform each nonmember employee, at the same time or before it seeks to obligate the employee to pay dues and fees under a union-security clause, that he has the legal right to remain a nonmember and the right under Beck to object to paying more than "representational" expenses. The Board held that notice could be provided through a monthly magazine available to nonmembers as well as members. The Board said:

> [T]he union should inform the employee that he has the right to be or remain a nonmember and that nonmembers have the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections. If the employee chooses to object, he must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures.

The Board also held that a union is not obligated on the basis of existing precedent to calculate its dues reductions on a unit-by-unit basis. They held that a dissident cannot object to litigation expenses incurred in a bargaining unit different from the objector's bargaining unit. The Board said:

> [T]hat some litigation may be of value to employees even when the lawsuit at issue arises out of the contract or circumstances of employees in a different unit.

In Weyerhaeuser, supra, the Board held that a union must inform all employees in the bargaining unit, not just nonmembers, of the rights of nonmembers under Beck if they were not informed of those rights prior to assuming obligations under a union-security clause. In addition, the Board held that a union also must inform all such employees that they have a right under the Supreme Court's ruling in NLRB v. General Motors, to become nonmembers of the union in order to be eligible to exercise Beck rights.

The Board, however, did not find that the union security clause covering the Weyerhaeuser employees was facially invalid. The clause required the employees to "become and remain members of the union in good standing." In light of its holding that the union unlawfully failed to provide notice of General Motors rights in connection with its duty to provide notice of Beck rights, the Board found it unnecessary to decide whether the clause's failure to explain the meaning of "membership in good standing" under General Motors rendered the clause facially invalid.

The Sixth Circuit reversed this aspect of Weyerhaeuser in Buzenius v. NLRB, 124 F.3d 788, 156 LRRM 2207 (1997). The court noted that under General Motors the only kind of membership that can be required under a union security clause is the "whittled down" version of "financial core" membership, i.e., the payment of initiation fees and dues. Here, however, the court found that the clause had the potential unlawful effect of causing employees to believe that membership in the colloquial sense, i.e., formal union membership was required.

The court concluded that "[a]llowing a union-security clause requiring union "membership in good standing" to remain unmodified in the CBA turns normal contract interpretation on its head . . . . Because the clause does not mean what it literally says, and because its literal application is unlawful, the clause has no place in the CBA." Accordingly, the court held that the Board abused its discretion by refusing to order that the clause be lawfully defined or removed from the collective-bargaining agreement.

Thus, for the first time, these decisions of the Board impose an affirmative duty on unions to disclose the precise obligations that workers have under union security agreements and the fact that "membership does not mean full membership to which employees may be contractually obligated." Thereafter, the Board applied the principles set forth in California Saw and Weyerhaeuser and found violations of the Act based on union failures to provide employees notice of the Beck rights. See I.U.E. Local 444 (Paramax Systems), 322 NLRB 1 (1996); remanded sub nom., Ferriso v. NLRB, 125 F.3d 865, 156 LRRM 2321 (D.C. Cir. 1997); Production Workers Local 707 (Mavo Leasing), 322 NLRB 35 (1996); Laborers Local 265 (Fred A. Newman), 322 NLRB 294 (1996); Carpenters Local 943 (Oklahoma Fixture), 322 NLRB 825 (1997); and IATSE Local 219 (Hughes-Avicom), 322 NLRB 1064 (1997).

Oklahoma Fixture is noteworthy in that the Board obligated the union to provide the mandated accounting of expenditures, notwithstanding the fact the union contended it offered the objecting employee a reasonable accommodation by informing him that he could pay the equivalent of full dues to a mutually agreed-upon charity. Although the Board found Beck notice violations in the above cases, it dismissed an allegation in Paramax that the union violated Section 8(b)(1)(A) by failing to have its chargeable expenses verified by an independent auditor. And in Fred Newman, the Board found that because the union had waived an objector's obligation to pay dues, the union did not act unlawfully by not providing him Beck financial information.

In Connecticut Limousine Services, 324 NLRB No. 105 (October 2, 1997), the Board continued to expand on its seminal decision in California Saw & Knife Works, Inc., defining the steps that a union must take to facilitate the exercise by employees of their rights under Beck to refrain from paying dues to support activities unrelated to a union's role as a collective-bargaining representative. The Board's main holding in Connecticut Limousine was that the information that a union must provide employees who have filed Beck objections is limited to "major categories" sufficiently informative to enable the objector to decide whether to mount a challenge to the agency fee that the union has established. The Board found that the union complied with this Beck requirement by furnishing to objectors the LM–2 reports submitted annually to the U.S. Department of Labor that contained a breakdown of the union's financial expenditures.

Connecticut Limousine also presented the issue of whether Beck objectors may be charged for a union's organizing expenses. Citing the Supreme Court's decision in Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435 (1984), that organizing expenses are nonrepresentational under the Railway Labor Act and cannot be charged to objectors, the judge held that such expenses are likewise nonchargeable to objectors under the NLRA. A Board majority declined to adopt the judge's conclusion in the absence of evidence indicating whether there are "significant differences" between employers covered by the RLA and NLRA and whether the effects of organizing under both statutes are different. These questions were remanded to the judge for further factual development and issuance of a supplemental decision.

Chairman Gould dissented on the issue of organizing expenses. He agreed with the judge that the Supreme Court's Railway Labor Act decision in Ellis that organizational expenses are nonchargeable applies with equal force to unions governed by the NLRB. Although disagreeing profoundly with Ellis, the Chairman stated that Ellis is the law of the land and there was no basis for avoiding its holding by "manufacturing a distinction in applicable law where none exists." Accordingly, rather than remanding the issue, the Chairman found that the union unlawfully charged objectors for its organizational expenses.[48]

In Automotive, Petroleum and Allied Employees Local 618 (Sears Roebuck & Co.), 324 NLRB No. 147 (Oct. 29, 1997), a union informed the unit employees it represented that unless more employees joined the union and paid dues, the union could not afford to represent them any longer. Employees were not required to join the union, and were not restricted from resigning. However, any employee who did join the union was required to sign an agreement to pay "financial core" dues to the union until "the termination of my employment at Sears or at such time as the union is no longer my collective bargaining representative, whichever is earlier." Chairman Gould and Member Fox comprised a Board majority which found that a union did not violate Sec-

[48] Furthermore, although not alleged in the complaint, the Chairman stated in fn. 1 of his partial dissent that the union security clause in the parties' collective bargaining agreement was facially invalid because of its language requiring unit employees to become "members of the Union in good standing." The Chairman explained the basis for this view one month later in his concurring opinion in Monson Trucking, 324 NLRB No. 149 (1997).

tion 8(b)(1)(A) by soliciting, maintaining and enforcing these contracts with individual employees. Member Higgins dissented.[49]

The Board held that the internal affairs of a union do not come within the purview of the Act unless an employee's employment status is affected or the union's actions are contrary to an overriding policy contained in national labor law. The Board found that neither of these circumstances were present in Sears, and that the situation was similar to that in Scofield v. NLRB, 394 U.S. 423 (1996), involving internal union rules. There, the Court stated:

> Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.[50]

Applying this framework in Sears, the Board found that the agreement at issue involved an internal union matter; a contract between the Charging Party and his union, individually and voluntarily entered into, which reflected a legitimate union interest in gaining financial support from an employee it represented. The Board noted that the only arguable infringement on the Charging Party's Section 7 rights was the agreement to pay financial core dues for an indefinite period of time. In this regard, the Board rejected the judge's finding that the open-ended duration of the agreement was contrary to the statutory scheme because it restricted the employee's right to refrain from assisting the union. The Board held that even if the financial core agreement did impose such a restriction, the Charging Party had "clearly and unequivocally waived his right to refrain from supporting the union, and no violation occurred because there is nothing in the national labor policy against such an agreement."

In Monson Trucking, Inc., 324 NLRB No. 149 (October 31, 1997), the Board found, inter alia, that the union violated Section 8(b)(1)(A) and (b)(2) by failing to withdraw its request to have an employee discharged after he complied with demands to satisfy delinquent dues obligations, and by failing to inform him of his Beck rights in connection with the notice of his dues delinquency.

In a concurring opinion, Chairman Gould expanded on his view set forth in fn. 1 of Connecticut Limousine[51] that union security clauses containing language requiring "membership in good standing" are facially invalid. Although the complaint in Monson did not allege as unlawful the union security clause which contained "membership in good standing" language, the Chairman expressed his agreement with the Sixth Circuit in Buzenius[52] that such clauses can no longer be considered lawful because of their tendency to mislead employees to believe that full membership, in its formal sense, is required. In fact, Supreme Court precedent has defined membership in union security clauses as requiring no more than the payment of dues and initiation fees related to the costs of representing unit employees. NLRB v. General Motors, 373 U.S. 734 (1963); Communications Workers v. Beck, 487 U.S. 735 (1988). Accordingly, to be lawful, the Chairman concluded that if unions and employers agree to a union security clause that contains "membership" or "membership in good standing" language, the contractual clause must contain a full explanation of that language consistent with the decisions in General Motors and Beck.

In Group Health, Inc., 325 NLRB No. 49 (Feb. 2, 1998), enf. denied sub nom. Bloom v. NLRB, No. 97–1582 ___ F.3d ___ (8th Cir. Aug. 7, 1998), the Board, on remand, granted a motion to amend settlement agreements, approved the second revised settlements, and held that a union-security clause that requires employees to become and remain members of the union and concurrently sets forth the limitations of that requirement, satisfies the concerns expressed by the Eighth Circuit in Bloom v. NLRB,[53] as well as the Board's Independent Stave[54] standards for approval of a settlement agreement. Despite the fact that the Board had requested the remand from the Eighth Circuit in order to address the issues raised by the Sixth Circuit's decision in Buzenius the majority determined that due to the age and procedural posture of the case, it was not an appropriate vehicle in which to address Buzenius. Chairman Gould concurred in the majority's decision, and Member Brame dissented.[55]

The majority noted that the language at issue in the original collective-bargaining agreement, that "All Employees of the employer ... shall, as a condition of con-

[49] In Member Higgins' view, a restriction on an employee's right to refrain from paying dues to the union impairs Section 7 rights just as does a restriction on resigning from the union. As he set forth more fully in footnote 16 in Sears, Chairman Gould is of the view that the statute as written does not provide for a "fundamental right to be free to resign from union membership."

[50] Id. At 430.

[51] 324 NLRB No. 105 (1997).

[52] 124 F.3d 788 (1997).

[53] 30 F.3d 1001 (8th Cir. 1994). In Bloom v. NLRB, the Eighth Circuit denied enforcement of an earlier Board order approving settlements solely on the ground that "[b]ecause the overly broad union security clause was unlawfully interpreted and applied, an adequate remedy in the is case requires the expunction of the offending clause."

[54] 287 NLRB 740 (1987).

[55] Member Brame would have disapproved the revised settlement agreements because in his view they did not remedy the defects identified by the Eighth Circuit, and because they put the Board in the business of issuing advisory opinions in unfair labor practice proceedings without litigation of the issues.

tinued employment, become and remain members in good standing in the union . . .” had been expunged in the second revised settlements, and new language substituted. The new language provided :

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in the Union, and all such Employees subsequently hired shall become members of the Union within thirty-one (31) calendar days, within the requirements of the National Labor Relations Act. Union membership is required only to the extent that Employees must pay either (i) the Union’s initiation fees and periodic dues or (ii) service fees which in the case of a regular service fee payer shall be equal to the Union’s initiation fees and periodic dues, and in the case of an objecting service fee payer, shall be the proportion of the initiation fees and dues corresponding to the proportion of the Union’s total expenditures that support representational activities.

The majority found that the substitute language above met the Eighth Circuit’s concerns, and rejected the Charging Party’s assertions that the substitute language was as misleading as the original language because of its statement that employees must become “members” of the union.

The Chairman concurred, agreeing with the majority’s decision to approve the revised settlements, because the union-security clause in the revised settlements was in accord with his views, as expressed in his concurrence in Monson Trucking,[56] that union-security clauses requiring unit employees to become “members” or “members in good standing,” without concurrent definition, are facially invalid under the Act. The Chairman also agreed that the concerns expressed by the Eighth Circuit’s opinion in Bloom had been rectified. However, the Chairman, unlike his colleagues, was of the view that the case was an appropriate form in which to address the Buzenius rationale, which he had partially adopted in his Monson Trucking concurrence.

The Chairman’s concurrence also noted that this case presented the Board with the opportunity to rectify the mistake it made forty years earlier in Keystone Coat,[57] where the Board set forth a model union-security clause requiring that employees become “members in good standing.” The Chairman’s concurrence proposed a new model union-security clause, which sets forth a concurrent definition of the limitations on union membership, and urged his colleagues to adopt such a clause in order to provide needed guidance in this area to practitioners and the public alike.

In Teamsters Local 618 (Chevron Chemical Co.), 326 NLRB No. 34 (August 24, 1998), a unanimous panel including the Chairman applied precedent in dismissing complaint allegations that the financial accounting of the union’s representational/nonrepresentational expenses provided to Beck objectors was inadequate and that the union unlawfully failed to account for such expenses on a unit-by-unit basis. The Board also dismissed an allegation that the union unlawfully failed to reflect that the Beck financial information provided to objectors was not verified by an independent auditor. In this regard, the Board noted that because the information was verified by an independent auditor, the case was not affected by the D.C. Circuit’s decision in Ferriso v. NLRB, 125 F.3d 865 (1997), which held, contrary to California Saw, that Beck dues calculations must be verified by an independent auditor.

The principal issue raised in Chevron, however, centered on the methodology that the union used in calculating reduced dues for Beck objectors. The union offset interest and dividend income that it received against nonchargeable expenditures prior to determining the respective percentages of chargeable/nonchargeable expenditures. The Board found this method unlawful because there was no evidence that the interest and dividend income was generated solely from non-dues income and, hence, it was impossible to determine whether “objectors were required to pay their ‘fair share’ of the union’s representational expenses.”

Members Fox and Hurtgen declined to pass on a method that they would find acceptable in calculating Beck dues. They noted, however, that in Railway Clerks v. Allen, 373 U.S. 113, 122 (1963), the Supreme Court indicated as acceptable a method whereby a union divides its expenditures for nonrepresentational purposes by its total expenditures and reduces objectors’ dues and fees by the resulting percentage.

In a concurring opinion, the Chairman wrote separately on this issue. He noted that in Machinists v. Street, 367 U.S. 740 (1961), the Supreme Court explained that the purpose behind an accurate calculation formula is to ensure that a union does not use the dues of objecting nonunion employees solely for representational activities, thereby impermissibly freeing up members’ dues to be used for nonrepresentational activities. To preclude such unlawful subsidization, the court in Street suggested as appropriate a formula that would refund to the objector the:

> portion of his money . . . in the same proportion that the expenditures for [nonrepresentational] purposes bore to the total union budget.

[56] 324 NLRB No. 149, slip op. at 6–7 (Oct. 31 1997).
[57] 121 NLRB 880 (1958).

The Chairman stated that he would express the Street formula in the converse, that is, "an objector is required to pay that portion of the dues that is equal to the ratio of dues spent for chargeable representational purposes to total dues collected." Although he acknowledged his colleagues' reference to the Allen formula, the Chairman concluded that the Street formula "appears to be preferable," but that he would "accept any formula which does not result in objectors paying for nonrepresentational activities."

UNLAWFUL UNION CONDUCT

In Laborers Union Local No. 324, Laborers International Union of North America, 318 NLRB 589 (August 25, 1995), enf. denied, 106 F.3d 918, 154 LRRM 2417 (9th Cir. 1997), Chairman Gould joined the majority of Members Stephens and Cohen in upholding the Administrative Law Judge's finding that the union violated Section 8(b)(1)(A) of the Act by adopting and maintaining a no-solicitation, no-distribution rule designed to preclude the distribution of dissident union material by threatening to have the dissident candidate for union office arrested and removed from the hiring hall and by threatening to have him arrested if he continued to disseminate such material outside the hiring hall. The Board held that this kind of conduct was a violation of the statute, notwithstanding the fact that it had not been enshrined into a formal rule, a requirement which dissenting Members Browning and Truesdale regarded as appropriate.

In Teamsters Local 955 (Interstate Brands Corp.), 325 NLRB No. 108 (April 8, 1998), the Board, Chairman Gould and Members Fox and Hurtgen, affirmed the judge's finding that the union did not violate Section 8(b)(1)(A) of the Act by refusing to agree to acceptance by the Central States Pension Fund of employer contributions on behalf of the nonstriking employees. The Board adopted the judge's finding that the respondent acted lawfully to strengthen its bargaining position rather than to punish those employees who had crossed the picket line. Chairman Gould concurred, but while noting that no 8(b)(3) violation had been alleged here, he stated that he would have found in these circumstances that the union had failed to meet its bargaining obligations under that section. In his view, Section 8(b)(3) forbids a union from making unilateral changes in the terms and conditions of nonstriking employees (and striker replacements as well). Accordingly, when during a strike, a union unilaterally changes the working conditions of nonstriking employees and strike replacements, the Chairman would find such action to violate Section 8(b)(3).

In Transportation Workers Union of America (Johnson Controls World Services), 326 NLRB No. 3 (July 31, 1998), Chairman Gould was joined by Members Fox and Hurtgen in reversing an Administrative Law Judge's holding that the union did not violate Section 8(b)(1)(A) by threatening to enforce a contractual union security clause against an individual if he ceased paying dues after his union membership was terminated for filing a decertification petition. In dismissing the complaint, the judge found that where, as here, a union's discipline of a member was lawful, it need not forego the right under the union security clause to collect dues from the disciplined member. In support of this conclusion, the judge cited Boilermakers (Kaiser Cement Corp.), 312 NLRB 218 (1993), which he interpreted as having overruled, sub silentio, Steelworkers Local 4186 (McGraw Edison Co.), 181 NLRB 992 (1970).

In reversing the judge, the Board held that when a union terminates, even lawfully, a unit employee's membership for a reason other than his failure to tender dues and fees, the language of proviso (B) of Section 8(a)(3) specifically renders it unlawful for the union to insist, pursuant to a union security clause, that the individual continue paying dues and fees as a condition of employment. Because the employee in this case was terminated from union membership for filing a decertification petition rather than for failing to pay dues, the Board concluded that the union's threatened enforcement of the dues payment provision of the union security clause "required" the conclusion that, under proviso (B) of Section 8(a)(3), the union's threat was a violation of Section 8(b)(1)(A).

The Board distinguished Kaiser, on which the judge relied, by noting that the employees in that case were not expelled from membership; instead, their membership privileges were diminished. However, to clarify any ambiguity that may have emanated from the judge's discussion of Kaiser, the Board stated that Kaiser does not protect union efforts to invoke a union security clause against individuals who have been denied or expelled from union membership for reasons other than the nonpayment of dues.

Chairman Gould went further. He expressed his agreement with the Board's holding in McGraw Edison that the union therein violated Section 8(b)(1)(A) by threatening enforcement of a union security clause against an employee whose membership was "significantly impaired" rather than terminated. Accordingly, to the extent that Kaiser could be read as overruling McGraw Edison, the Chairman stated that he would overrule Kaiser.

ILLEGAL SECONDARY CONDUCT

In Painters and Allied Trades District Council No. 51 (Manganaro Corporation), 321 NLRB 158 (May 10, 1996), Chairman Gould and Member Browning, with

Member Cohen dissenting, held that the anti-dual-shop clause sought by the union had a primary objective and thus did not violate Section 8(b)(4)(B) of the Act. The majority agreed with the judge's finding that the clause was a primary work-preservation clause and that the clause was not unlawful on its face.

A central issue in Indeck Energy Services, 325 NLRB No. 204 (July 16, 1998), was whether Indeck Energy Services was an employer in the construction industry within the meaning of the proviso to Section 8(e). Indeck owns and operates cogenerational facilities nationwide, and sought to build one in Corinth, New York. Prior to the commencement of the project, Indeck was approached by union officials who sought to have union labor employed on the job. Their discussions led to a letter dated February 20, 1992, in which Indeck stated that it was committed to building the project with union labor and it would instruct its contractor to execute the union's project labor agreement. The unions later filed a lawsuit seeking damages for the repudiation of this agreement, and Indeck filed a charge with the Board, asserting that the unions violated Section 8(e) by entering into an agreement in which Indeck agreed to cease doing business with another person.

The Administrative Law Judge, based on "various documents" subpoenaed by the respondent unions found that Indeck was an construction industry employer. The Board remanded the proceeding to the judge in order to reopen the record and permit the parties to introduce additional evidence as to Indeck's status as an employer within the construction industry.

Chairman Gould concurred in the decision to remand, but only after first resolving the other central issue in the case, which was whether the February 20 letter constituted an "agreement" that would come within the purview of the proviso. In the Chairman's view, Board resources would have been wasted on a remand if the letter agreement would have violated the Act regardless of Indeck's employer status.

The Chairman noted that in Connell Construction Co., v. Plumbers Local 100, the Supreme Court stated that the construction industry proviso's authorization "extends only to agreements in the context of collective bargaining relationships and ... possibly to common situs relationships on particular jobsites as well.[58]" The Chairman determined that although the February 20 letter agreement did not meet the first prong of Connell, in that it was not negotiated in the context of a collective-bargaining relationship, it did fall within the protection of the construction industry because it was addressed to common situs problems and jobsite tensions, within the meaning of the second prong of Connell. In this regard, the Chairman noted that the purpose of the letter agreement was to ensure that only union employees were employed at the jobsite. Further, the Chairman noted that the agreement was limited to the Corinth project, and that there was no evidence that the union's interest in seeking the agreement with Indeck was aimed at union objectives elsewhere. Accordingly, because he found that the letter agreement fell within the protection of the proviso under the second prong of Connell, he joined his colleagues in the remand to the judge for further evidence on the issue of Indeck's status as an employer within the construction industry.

Coastal Stevedoring Company, 323 NLRB No. 178 (June 18, 1997), involved the secondary boycott prohibitions of the Act and arose out of a dispute in which an American union invoked the principles of international solidarity with their Japanese counterparts. In an earlier decision, 313 NLRB 412 (1993), the Board majority had held the ILA had violated our secondary boycott law. The complaint alleged that the ILA was responsible for certain threats by Japanese unions not to unload fruit in Japan that had been loaded in Florida by nonunion labor. The Board found that the Japanese unions acted as the agents of the ILA under the agency theories of authorization and ratification. The Court of Appeals for the District of Columbia reversed the Board and remanded.[59]

On remand, the Board majority, Members Fox and Higgins, found that the court's opinion precluded a finding that the Japanese unions were the agents of the American union under any theory of agency. The majority also held that the American union could not be held responsible for the threats under a joint venture theory. Noting that the D.C. Circuit's decision was "less than clear" as to whether the court's opinion permitted further consideration of the joint venture theory on remand, the majority found that to the extent such consideration was permissible, the record failed to establish any joint planning that would establish a joint venture relationship between the American union and the Japanese unions.

In his dissenting opinion, Chairman Gould stated that:

> It is clear . . . that the Respondent ratified the conduct of Japanese unions. Not only did the Respondent fail to disavow the widely disseminated threats made by the Japanese unions (indeed, the Respondent requested that the threats be made), the Respondent, by its November 6 letter, explicitly endorsed the prior threats and acknowledged that they were made on behalf of the Respondent. By this

[58] 421 U.S. 616, 633 (1975).

[59] Longshoremen ILA Assn. v. NLRB, 56 F.3d 205 (D.C. Cir. 1995); cert. denied 116 S. Ct 1040 (1996).

conduct, the Respondent manifested the intent to treat the threats made by Japanese unions as authorized by the Respondent, and thus created an agency relationship under the doctrine of ratification.

To the extent that the court's opinion found the doctrine of ratification inapplicable on the ground that the Respondent exercised no control over the conduct of the Japanese unions, I respectfully disagree with the court's opinion. Ratification, by its definition, does not require the existence of an actual right of control. Indeed, its definition does not even require that the principal have knowledge of the acts until after they are done.

Chairman Gould also found, looking to prior Board definitions, that the doctrine of apparent authority implicated the American union, noting that:

> Although I find, from the foregoing facts, that the Japanese unions acted as the agents of the Respondent, I do not believe that such a finding would necessitate an agency finding in most circumstances involving union solidarity or support. Indeed, I have long recognized the significance of international labor solidarity, and I do not believe the Act should be interpreted so as to necessarily hinder the typical act of union solidarity. In the instant case, it is not the existence of labor solidarity alone that created the agency relationship. Rather, it was the specific circumstances, namely, the Respondent's October 4 letter which became an integral part of the threats made to neutrals, the failure to disavow the threats, and the Respondent's November 6 letter endorsing the prior threats and acknowledging that they were made on its behalf, that established the agency relationship under the law. As mentioned above, a finding of a violation here would not, without more, necessarily give rise to a finding of agency in other circumstances involving the typical act of solidarity shown by one union toward another. Consequently, my conclusion concerning the foregoing facts should not be construed as having broader applications with respect to other relationships that are formed for purposes of promoting international labor solidarity.

Finally, while the unlawful activity at issue occurred in Japan and the statute is not, as a general matter, extraterritorial, Chairman Gould noted that the "letters requesting and ratifying the threats by the Japanese unions were sent from the United States, and the intent and effect of the overseas pressure was to effect the secondary boycott in the United States."

In Oil Workers Local 1–591 (Burlington Northern Railroad), 325 NLRB No. 45 (Jan. 27, 1998), the Board held that the union, which was engaged in a labor dispute with a subcontractor working on the premises of a neutral refinery, violated Section 8(b)(4)(B) by picketing at the refinery gate reserved for the neutral railroad that transported the product of the neutral refinery.

Texaco, the neutral refinery owner, operated a facility on refinery grounds that produced "coke," a byproduct of oil. Texaco subcontracted part of its coke-making operation to WPS, the primary employee with which the union had a labor dispute.

Texaco set up a reserve gate system. One gate was for Texaco employees and suppliers, another gate was for WPS employees and suppliers, and a third gate was for Burlington Northern—the neutral railroad that came into the refinery to pick up the coke for delivery to Texaco customers. In furtherance of its dispute with WPS, the union picketed not only the gate reserved for WPS employees and suppliers, but also the gate reserved for Burlington.

The Board majority, consisting of Chairman Gould and Members Hurtgen and Brame, found that the picketing was common situs picketing because it took place at the refinery, which was owned by neutral Texaco and was the location where multiple neutral contractors worked. Accordingly, under Moore Dry Dock, 92 NLRB 547 (1950), which applies in common situs cases, the Board majority found that the union was required to confine its picketing to the WPS gate. By expanding the picketing to include the gate used by neutral Burlington, the majority concluded that the picketing was secondary and unlawful.

In reaching this conclusion, the majority rejected the union's argument that Burlington was lawfully picketed pursuant to the "related work test" developed by the Supreme Court in Electrical Workers Local 761 (General Electric) v. NLRB, 366 U.S. 667 (1961), and Steelworkers (Carrier Corp.) v. NLRB, 376 U.S. 492 (1964), which holds that picketing of otherwise neutral employers is lawful of their duties are connected with the normal operations of the primary employer. The majority noted, however, that this test applies only to situations in which the primary employer is the owner of the picketed premises. Therefore, regardless of how related the duties of Burlington were to the work of WPS, the majority found that Burlington could not be picketed under the related-work test because neutral Texaco, not WPS, was the sole owner of the picketed premises.

The majority also rejected the union's argument that as a "supplier" of rail cars to WPS, Burlington was lawfully picketed under the "supplier" exception to the Moore Dry Dock test, which holds that a supplier of a primary employer may be picketed if it provides "mate-

rials essential to the primary employer's normal operations or solely for the use of the primary's employees." Iron Workers Local 433 (Chris Crane), 294 NLRB 182, 183 (1989). The majority found this exception unavailing to the union on two grounds: (1) Burlington, to the extent that it could be considered as a supplier of anything, was a supplier of a coke transport service to neutral Texaco, not WPS; and (2) even if Burlington was a transportation service supplier of WPS as contended by the union, such service was not for the sole use of WPS as required by the supplier exception to the Moore Dry Dock test.

In a concurring opinion, Chairman Gould recounted the history underlying the purposes and policies of the law of secondary boycott. While stating his willingness to expand on or reverse Board law in this area, he concluded that the arguments advanced by the union for doing so in this case were not compelling.

In dissent, Members Fox and Liebman would have found that, as the transporter of the coke produced by WPS, Burlington was a legitimate target of primary picketing. They noted that the Supreme Court in Carrier has held that carriers who pick up and haul away the products of a struck employer may be picketed as they attempt to make the pickups, at least where the situs of the dispute is at the primary's facility. The dissenters saw no reason to hold otherwise in the common situs context, since unions may lawfully picket gates used by suppliers of materials that are essential to the normal operations of a primary employer at a common situs.

In Warshawsky & Company, 325 NLRB No. 141 (May 14, 1998), the Board found that the union, Iron Workers Local 386, did not violate Section 8(b)(4)(i) and (ii)(B) of the Act by handbilling a construction site. Chairman Gould concurred with the result, but stated that it was a close case as to whether the respondent was indeed making an appeal, through a careful wink and nod, for the employees to engage in a work stoppage. He noted that the respondent chose to handbill the jobsite when its only audience would be neutral employees, that the handbill's message—although disclaiming any interest in a work stoppage—reasonably conveyed the respondent's desire to engage the neutral employees in the respondent's dispute with the primary employer, and that the neutral employees refused to report to work after receiving the handbills. Chairman Gould, however, found that there was not sufficient evidence to support a "nod, wink, and a smile" theory of a violation where the handbill explicitly stated that it was not seeking a work stoppage and there is no evidence what the respondent said to the neutral employees. Chairman Gould stated that "in the final analysis, a finding of a violation must be based on something more than the mere fact the employees ceased work in response to the respondent's conduct."

REMEDIES

In Fieldcrest Cannon, Inc., 318 NLRB 470 (1995), enfd. in part 97 F.3d 65, 153 LRRM 2617 (4th Cir. 1996), petition for rehearing denied February 10, 1997, the Board (Chairman Gould and Member Browning; Member Stephens concurring and dissenting in part) found that the respondent employer's unfair labor practices were so numerous, pervasive, and outrageous that special notice and access remedies were necessary to dissipate fully the coercive effect of the violations.

In NLRB v. Unbelievable, Inc., 71 F.3d 1434, 150 LRRM 3002 (9th Cir. 1995), the Board and union sought sanctions against the respondent employer for filing a frivolous appeal from the underlying Board's decision (309 NLRB 761 (1992)). The court granted the requests and ordered the respondent employer and its original counsel, jointly and severally, to pay the Board and union attorneys fees and double costs.

In A.P.R.A. Fuel Oil Buyers Group, Inc., 320 NLRB 408 (December 21, 1995) enfd. 134 F.3d 50, 157 LRRM 2001 (2nd Cir. 1997), Chairman Gould joined a Board majority which interpreted the Supreme Court's Sure-Tan decision, which had concluded in 1984 that undocumented workers are employees within the meaning of the National Labor Relations Act. The question in A.P.R.A Fuel was whether such workers are entitled to backpay and the Board answered this question in the affirmative. The Chairman, along with Member Truesdale, rejected the view of Member Browning that the employer could be ordered to hire applicants referred by the union in the event that dismissed workers were not eligible for reinstatement. The Chairman explicitly stated that the Board does not have the authority to grant such a remedy.

The A.P.R.A. Fuel case has triggered legislative initiatives by the Congress, specifically, in the form of a bill put forward by Congressman Tom Campbell. Congressman Campbell, in legislation initially offered in 1996, would substitute a fine for the backpay ordered by A.P.R.A. so as to eliminate the incentive for illegal behavior without compensating employees who are not lawfully in the United States.

In Temp-Rite Air Condition, 322 NLRB 767 (December 27, 1996), Chairman Gould joined with Member Higgins, over Member Browning's dissent, to hold that a deduction from backpay may be made where an employee sold the employer's property and did not reimburse the employer.

In one of the salting cases that has emerged as a result of the Supreme Court's unanimous affirmance of the Board's view that paid union organizers are employees

within the meaning of the Act, Chairman Gould dissented from the holding of Members Browning and Cohen in Eldeco, Inc., 321 NLRB 857 (July 29, 1996), that an employee who was not capable or qualified to perform the work could nonetheless receive reinstatement and have backpay adjudicated in compliance. Chairman Gould expressed the view that "reinstatement" and other traditional remedies are not to be awarded automatically.

Similarly, in Paper Mart, 319 NLRB 9 (September 20, 1995), Chairman Gould expressed the view that he would find unlawful discrimination in any case in which the General Counsel establishes that an employer's adverse action against an employee is based in whole or in part on anti-union animus. Chairman Gould would find that an employer's showing that the adverse action would have occurred in any event goes only to the remedy issued against the employer.

In Nabors Alaska Drilling, 325 NLRB No. 104 (April 8, 1998), the Board found that the respondent, in violation of Section 8(a)(1), interfered with an election by denying union representatives access to employees who worked on the respondent's remote Alaskan oil drilling rigs. Members Fox and Hurtgen found that this conduct, as well as Section 8(a)(1) threats by supervisors that employees would lose their jobs if the union won, warranted setting aside the election and ordering a second election to be held.

Chairman Gould dissented in part from the remedy. Rather than ordering a second election, and notwithstanding that the union never demonstrated a showing of majority support, the Chairman stated that he would overrule Board precedent that precludes issuance of nonmajority bargaining orders and order the respondent to bargain based on the Section 8(a)(1) violations in the instant case as well as its post-election discharge of two union supporters in violation of Section 8(a)(3). See "Nabors II", 325 NLRB No. 105 (April 8, 1998). Noting that the union obtained a 49 percent showing of support and finding that the respondent's unfair labor practices were outrageous and pervasive "Category 1" violations under NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), the Chairman concluded that this case demands the revival of the potent nonmajority bargaining order remedy that the Board wrongly discarded in Gourmet Foods, 270 NLRB 578 (1984).

In Page Litho, Inc., 325 NLRB No. 46 (January 30, 1998), a Board majority granted the union's request for review of the Regional Director's decision in a compliance proceeding that the respondent had extended an unconditional offer of reinstatement to the former unfair labor practice strikers, and that this offer had been rejected by the employees' actions. The majority found that the union raised a substantial question by contending that a letter sent March 30 by the respondent to the employees did not state that the employees were to report for work on April 18, but merely invited them to attend a meeting on that date, and that the letter specified a reporting time that was not the regular starting time of the employees. In addition, the majority found that by raising the question of whether the respondent's March 30 letter was a valid reinstatement offer or merely an invitation to a meeting, the union also raised a substantial question as to whether the employees' refusal to attend the "meeting" on April 18 without the presence of the union attorney was a waiver of their right to reinstatement.

The Chairman dissented in part, agreeing with the Regional Director that the respondent had made a facially valid and unconditional offer of reinstatement to the employees in its March 30 letter which stated in part "the NLRB would have us [ ] offer you an unconditional return to work at pre-strike levels of wages and benefits . . . . This we are willing to do." The Chairman would find further that the strikers effectively waived reinstatement by insisting that the union attorney be allowed to accompany them when they returned to the facility in response to the respondent's invitation and by leaving the premises when the respondent refused to allow the attorney to do so.

Contrary to his colleagues, the Chairman found no case support for the principle that the Board requires a valid offer of reinstatement to specifically identify what the employees' starting time or shift will be, or that an unconditional offer of reinstatement is invalidated because employees were invited to attend a meeting prior to returning to work. In addition, the Chairman agreed with the Regional Director's finding that regardless of whether the employees were returning to work or attending a meeting, there is no legal basis for the employees' insistence on the presence of the union attorney upon their return, and therefore the respondent was under no obligation thereafter to respond to the union's renewed offer on behalf of the employees to return to work.

Two related cases presented the issue of the appropriateness of a broad nationwide cease-and-desist order and nationwide posting of the order at all of a respondent employer's facilities. In Beverly California Corp., 326 NLRB No. 29 (August 21, 1998), ("Beverly II"), the Board, Chairman Gould and Members Fox and Liebman, found that the respondent committed approximately 78 unfair labor practices at 17 facilities in nine states. In Beverly California Corp., 326 NLRB No. 30 (August 21, 1998), ("Beverly III"), issued the same day, the Board, Chairman Gould and Members Fox and Liebman, found that the respondent committed another

approximately 28 unfair labor practices at nine facilities in six states.

In each case, the Administrative Law Judge recommended that the Board issue a broad corporate-wide order. In reaching this conclusion in Beverly II, the judge considered the respondent's extensive history of unfair labor cases including the Board's decision in Beverly California Corp., 310 NLRB 222 (1993) ("Beverly I"),[60] in which the Board found that the respondent had committed some 135 violations at 32 facilities, the record before him, and noted that, while Beverly I was being litigated, the unfair labor practices charges and complaint that formed the basis of both Beverly II and Beverly III were being filed and issued against the respondent. The Beverly II judge concluded that the violations disclosed a continued corporate effort by the respondent to become or remain union free at the expense of its employees' Section 7 rights and that the broad corporate-wide Order was appropriate. In Beverly III, the judge based his recommendation on his review of Beverly I, the record and the judge's decision in Beverly II and the record before him in Beverly III. He essentially found that the respondent had demonstrated a proclivity to violate the Act and that the violations could not reasonably be viewed as isolated occurrences with no connection to central management.

In Beverly III, the Board adopted the judge's recommendation that a nationwide cease-and-desist order be posted at all of the respondent's facilities. Citing J. P. Stevens & Co.,[61] the Board noted that it has the authority to issue employer-wide orders against a recidivist with a record of unfair labor practices in more than one facility and that a corporate-wide order is warranted on the basis of the respondent's record of violations committed during the total period covered by Beverly I, Beverly II, and Beverly III. The Board noted that the violations in the three cases total approximately 240; they were committed at 54 different facilities in 18 states and include a number of differing types of coercive conduct within the meaning of Section 8(a)(1), as well as violations of Section 8(a)(3) and 8(A)(5). The Board also noted the continuing involvement of divisional or regional personnel in the commission of the unfair labor practices and the evidence of actual corporate control of labor relations in those facilities. The Board concluded that the record supports the findings that, in attempting to achieve its goal of opposing unionization, the respondent regularly engaged in brinksmanship at the expense of its employees' Section 7 rights and frequently stepped over the line into the commission of unfair labor practices, and, accordingly, a broad order with corporate-wide application is warranted.

In Beverly II, however, the Board majority, Members Fox and Liebman, reversed the judge's recommendation that a broad cease-and-desist order be posted at all of the respondent's facilities nationwide. The majority found that inasmuch as it had granted such a broad corporate-wide order in Beverly III it was unnecessary to grant one in Beverly II. In dissent, Chairman Gould stated that he would give the same the broad nationwide order in both Beverly II and Beverly III. He noted that two cases were decided the same day and that the conduct in Beverly III was simply a continuation of the same conduct present in Beverly I and Beverly III. In these circumstances, Chairman Gould saw no reason why the Board should not consider the conduct in Beverly III in deciding the appropriate remedy in Beverly II.

In Beverly II, Chairman Gould also dissented with regard to the majority's finding that the respondent violated Section 8(a)(1) when it solicited employees at its Pioneer Place facility to form and join an employee council. Noting his long support of the formation of employee participation committees as a means of achieving cooperation and democracy in the workplace, Chairman Gould stated that the Act allows employers and employees to explore cooperative efforts without the fear that one error or isolated incident will transform a genuine attempt at cooperation into the unlawful domination of a labor organization. In the instant case, where the respondent proposed establishing a council consisting of representatives of various departments for resolving problems among themselves and then abandoned its proposed council after ascertaining that it was possibly unlawful, Chairman Gould found there was no attempt by the respondent to interfere with or undermine the employees' collective-bargaining representative.

ATTACHMENT G

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

HAND DELIVER VIA MESSENGER

July 7, 1998

Honorable William Jefferson Clinton
The President of the United States
The White House
Washington, DC 20500

Dear President Clinton:

[60] The United States Court of Appeals for the Second Circuit denied nforcement of the Beverly I corporate-wide order in Torrington Extend-A-Care Employee Association v. NLRB, 17 F.3d 580 (2nd Cir. 1994).

[61] 244 NLRB 407 (1979), enfd. 668 F.2d 767 (4th Cir. 1979), petition for cert. granted and remanded for reconsideration on other grounds, 456 U.S. 924 (1982).

This is to advise you that at some point prior to August 27, 1998—the date on which my term of office expires—I shall resign as Chairman and Member of the National Labor Relations Board. When first approached about this position in May 1993, I stressed my intent to serve only one term and now the time has come for me to depart and to return to my duties as a law professor at Stanford Law School.

It has been an honor to serve in your Administration as head of our independent quasi-judicial agency in which so many career employees serve with distinction. You will recall that last year you bestowed the President's Award for Distinguished Federal Civilian Service upon my former Chief Counsel, William R. Stewart, the first individual with the National Labor Relations Board ever to receive the President's Award. This award symbolizes the standards of excellence adhered to by the career employees with whom I have served.

I am of the view that during the past four-and-one-half years of my tenure as Chairman we have made considerable strides toward the substitution of cooperation for conflict and the goal of bringing our people together as one Nation which promotes and respects the rights and obligations of both labor and management. Thus, we have diminished the polarization and contentiousness that prevailed at the Board's beginnings, and that of the National Labor Relations Act, 63 years ago—notwithstanding its continued existence in some labor-management relationships in the private sector within our jurisdiction.

During this period the Board has promoted new settlement procedures so as to lessen the amount of otherwise wasteful litigation, reduced (at least during our first two years) the case backlog, stressed the National Labor Relations Act's principal focus upon both the promotion of collective bargaining and freedom of association for workers, and restored the Board's credibility as an impartial arbiter of labor-management disputes. Our success in enforcing our orders in the courts has never been better. Based upon all of these indicia, the state of the National Labor Relations Board in 1998 has improved considerably during my Chairmanship.

Honorable William Jefferson Clinton
July 7, 1998
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Nearly 133 years ago, my great-grandfather—having had the chance to serve the United States Government as an escaped slave under the most perilous and arduous circumstances of the War of the Rebellion—received his discharge papers in Charlestown, Massachusetts after three years of service in the United States Navy. I have been privileged to carry on this tradition of public service and I thank you for the opportunity to have done so.

I wish you Godspeed during the remainder of your term of office.

Sincerely Yours,

/s/ William B. Gould IV

Chairman

THE WHITE HOUSE

WASHINGTON

July 29, 1998

Mr. William B. Gould IV
Chairman
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Dear Bill:

I have received your letter of July 7, and it is with regret that I accept your resignation as Chairman of the National Labor Relations Board, effective not later than August 27, 1998.

Your vision and expertise over the past four years have helped to restore the American public's confidence in the NLRB. With a strong commitment to promoting stable labor-management relations, you have skillfully guided the NLRB through the challenges posed by today's rapidly changing work environment. I am especially grateful for your commitment to my Administration's reinvention initiative. At the NLRB, this commitment has translated into more efficient administrative processes, expedited legal procedures, and a reduction in the need for lengthy and costly litigation.

The NLRB's forward-thinking, innovative agenda is more important than ever, as our country strives to meet the social and economic challenges of the 21st century workplace. I know that your wise counsel and judgment will be missed—as will the dedication and energy that you have brought to the NLRB. I know, too, that these extraordinary qualities will serve you well as you return to private life.

Best wishes for every future success.

Sincerely,

BILL CLINTON

ATTACHMENT H

WILLIAM BENJAMIN GOULD IV
BIOGRAPHICAL DATA

(Born in Boston, Massachusetts, July 16, 1936)

William B. Gould IV was nominated by President Clinton as Chairman of the National Labor Relations Board on June 28, 1993. He was confirmed by the Senate on March 2, 1994 and sworn into office on March 7, 1994. His term expires August 27, 1998. About Chairman Gould the Rutgers University President, in awarding him an honorary doctorate, said: "perhaps more than any other living American . . . [you have] contributed to the analysis, the practice, and the transformation of labor law and labor relations." Mr. Gould was named to Ebony Magazine's 100+ Most Influential Black Americans list for 1996, 1997 and 1998.

At the time of his appointment, Chairman Gould was Charles A. Beardsley Professor of Law at Stanford Law School and he is on leave from that position. He had been Professor of Law at Stanford since July 1972. A 1961 graduate of Cornell Law School, he studied comparative labor law at the London School of Economics ('62–'63) with Professor Otto Kahn Freund.

He has received the following degrees: A.B. 1958, University of Rhode Island; LL.B. 1961, Cornell Law School; LL.D. 1986, (Honorary) University of Rhode Island; LL.D. 1995, (Honorary) The District of Columbia School of Law; LL.D. 1996, (Honorary) Stetson University College of Law; LL.D. 1997, (Honorary) Capital University Law School, LL.D. 1998, (Honorary) and Rutgers, The State University of New Jersey. Prior to Stanford, he was Assistant General Counsel of the United Auto Workers in Detroit ('61–'62); Attorney for the National Labor Relations Board in Washington, D.C. ('63–'65); represented management in labor law matters with Battle, Fowler, Stokes & Kheel in New York, New York ('65–'68); Professor of Law at Wayne State Law School in Detroit ('68–'71); and Visiting Professor of Law at Harvard Law School, Cambridge, Massachusetts ('71–'72). On loan from Stanford, he served as Visiting Professor of Law at Howard Law School in Washington, D.C. (1989).

The author of six books and more than fifty law journal articles as well as newspaper articles in such publications as The New York Times and the Manchester Guardian, Chairman Gould was appointed to the Commission on the Future of Worker-Management Relations established by the Clinton Administration on March 24, 1993 he resigned simultaneously with his confirmation as Chairman of the National Labor Relations Board. Chairman Gould has been a member of the National Academy of Arbitrators since 1970, and has arbitrated and mediated more than 200 labor disputes since 1965. Some of the more prominent are: in 1989, wage dispute between the Detroit Federation of Teachers and the Board of Education of that city as well as 1992 and 1993 salary disputes between the Major League Baseball Players Association and the Major League Baseball Player Relations Committee. In 1983–84, he was Co-chairman of the California Bar Ad Hoc Committee on Wrongful Dismissals which issued a report on February 8, 1984, providing recommendations to the California Legislature on this subject.